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No. 82 5853

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

EDWARD B. FITZGERALD,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED

I. whether the trial court's instructions at sentencing were tantamount to a directed verdict of death after the jury returned with a finding of the existence of aggravating circumstances suggesting non-unanimity?

II. Whether petitioner was denied due process where the only evidence of penetration to sustain capital murder based on rape was his uncorroborated "admission" to a jail inmate called as a surprise witness?

III. Whether the trial court had an affirmitive duty to inquire further of defense counsel when the court had actual knowledge of a potential conflict of interest on the part of that counsel?

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Petitioner, Edward B. Fitzgerald, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia entered in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Virginia is reported in Fitzgerald v. Commonwealth of Virginia, ___ Va. ___, 292 S.E.2d 796 (1982), and is appended hereto at 1a. The order of the Supreme Court of Virginia denying Mr. Fitzgerald's petition for rehearing is unreported.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on June 18, 1982. A timely petition for rehearing was denied on September 9, 1982. On November 1, 1982, Chief Justice Warren E. Burger, Circuit Justice for the Fourth Circuit, issued an order granting petitioner to and including

December 8, 1982, to file this petition. Jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and intending to here assert deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> ... nor cruel and unusual punishments inflicted;

the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> No state shall ... deprive any person of life, liberty or property, without due process of law;

and the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence.

2. This case also involves Va. Code §18.2-31 (1950), as amended, which provides in relevant part:

> The following offenses shall constitute capital murder, punishable as a Class 1 felony:
>
> * * *
>
> (d) The willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon;
>
> (e) The willful, deliberate and premeditated killing of a person during the commission of, or subsubsequent to, rape;

Va. Code §19.2-264.2, which provides:

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed[ ];

and Va. Code §17.110.1, which provides in relevant part:

> C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:
>
> 1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor.

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari from this Court to the Supreme Court of Virginia to review a decision of that court upholding his convictions and sentence of death.

Petitioner is convicted of capital murder (two counts), armed robbery, rape, abduction with intent to defile, and burglary, all arising from a series of incidents occurring on November 13 and 14, 1980. The jury recommended sentences of death for capital murder based upon the "vile, horrible or inhuman nature" of the offense, Va. Code §19.2-264.2, and life sentences for each of the remaining convictions.

Five days prior to trial, petitioner was informed, for the first time, by the trial court that the wife of his princi-

ple defense attorney, Fred S. Hunt, worked for the very Commonwealth Attorney's office that was prosecuting the case. App. at 28a. The trial court asked petitioner if he was satisfied with his attorney but the court failed to inquire as to whether counsel was able to effectively represent petitioner. App. at 29a-30a.

The evidence presented at trial by the Commonwealth fundamentally was based on the testimony of petitioner's co-defendant, Daniel Johnson, who was arrested on November 14, 1980, prior to petitioner's arrest. As a result of plea bargaining, petitioner's co-defendant never stood trial for the capital offense for which he was indicted, and instead was sentenced to forty years in prison. Petitioner has consistently maintained his innocence.

At trial the Commonwealth presented evidence, through Johnson, that petitioner and Johnson had, on the evening of November 13, been at petitioner's house together with several other people, when petitioner received a phone call from a friend indicating that the friend expected some trouble.[1/] Tr. 344-346. Petitioner produced a machete, which Johnson strapped on, and they proceeded to the house of petitioner's friend. Tr. 346. Finding no trouble at that house, petitioner and Johnson decided to go to the temporary residence of the murder and rape victim, Patricia Cubbage, to look for drugs. Tr. 353. They did not expect her, or anyone else, to be at home.

After breaking into the Cubbage house, Johnson stayed downstairs while petitioner went upstairs. Tr. 359. Johnson heard a woman's voice and went upstairs into Cubbage's

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1/ The description of the events of November 13 and 14 presented in this Statement of the Case, are based solely on Johnson's testimony, unless otherwise noted.

bedroom. Tr. 355-356. He found Cubbage on the floor with petitioner standing over her. Tr. 356. He and petitioner helped Cubbage onto her bed. Tr. 357. Petitioner proceeded to unzip and drop his pants and move onto the bed. Tr. 359. At this point, Johnson turned around towards the wall and saw nothing further until petitioner was pulling his pants back up. Tr. 359. (A single pubic hair, consistant with petitioner's, was later found on the bedsheet. Tr. 597.) At this point, petitioner decided to abduct Cubbage, in order to "finish the job he had come there to do." Tr. 363. Petitioner, Johnson and Cubbage proceeded in Johnson's car to a secluded area where, Johnson states, she was slain by petitioner by multiple stabbings. The body was found on November 14 and both petitioner and Johnson were arrested later that day.

The Commonwealth supplemented Johnson's testimony at trial with that of Wilbur Caviness, who had been a inmate in the jail where petitioner had been kept prior to trial, and whose charges were then pending. Tr. 423, 428. Caviness, who was used by the Commonwealth as a "surprise" witness, testified that Fitzgerald had told him that he had killed and mutilated Cubbage because "[I] screwed the woman and the pussy was so good to [me that I] cut it out and carried it home to eat." Tr. 423.

After petitioner was convicted of capital murder and the other offenses, a separate sentencing hearing was held. At that hearing the Commonwealth produced evidence that petitioner had several years earlier been convicted of the unlawful wounding of his wife, tr. 879, in attempt to show that petitioner was a continuing serious threat to society. Va. Code §19.2-264.2. The jury was instructed orally and in writing that it could impose the death penalty if it found either that he posed a future threat to society or if his conduct was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of

mind, or an aggravated battery to the victim." Id.

The jury deliberated for over 8 hours and returned with a verdict of death based upon the two aggravating circumstances they found in the alternative. App. at 22a. The trial judge ordered the jury to renew deliberations and to "make an election as to which one you did find he did." App. at 24a. The jury returned with a verdict finding the existence of the "vileness" aggravating circumstance. App. at 26a. On appeal the Virginia Supreme Court affirmed the convictions and death sentence. Fitzgerald v. Commonwealth, ___ Va. ___, 292 S.E.2d 798 (1982).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner alleged in his brief on appeal that his trial counsel was ineffective due to the conflict of interest posed by the employment relationship of counsel's wife with petitioner's prosecutor. The Virginia Supreme Court rejected petitioner's contention that his Sixth Amendment rights were violated by this conflict of interest holding that there was no evidence of a potential conflict of interest which would have required any inquiry by the trial court. App. at 14a-15a.

The question presented concerning the instructions to petitioner's jury at sentencing which amounted to a directed verdict of death was not expressly raised at petitioner's trial or in his brief on direct appeal to the Supreme Court of Virginia. Nevertheless, it was sufficiently raised and considered in the Supreme Court of Virginia to sustain this Court's jurisdiction. Pursuant to Va. Code §17.110.1(C), the Virginia Supreme Court is required to independently ascertain whether the sentence of death "was imposed under the influence of any ... arbitrary factor." The disjunctive verdict which raised a question of lack of unanimity and

the prejudicial instructions given by the trial judge to correct the verdict resulted in sentencing fraught with substantial arbitrariness. Thus, the Virginia Supreme Court was charged by statute to consider this claim and implicitly did so. App. at 15a-16a.

Petitioner's trial counsel, at the close of the Commonwealth's case and after the verdicts were returned, moved to strike the evidence of capital murder predicated upon the rape as insufficient as a matter of law. On direct appeal, petitioner designated that claim as error 12(d) in his assignments of error. App. at 19a. The Virginia Supreme Court treated the error as waived because it was not pursued on brief or in oral argument. App. at 7a. Yet, in previous capital cases the Supreme Court of Virginia has expressly examined assignments of error neither briefed nor argued rather than holding them to be waived. See, e.g. Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), cert. denied, 451 U.S. 1011 (1981). Appellate counsel's reliance upon such prior pronouncements by the Virginia Supreme Court should not prejudice petitioner's right to review by this Court in light of the motions to strike in the trial court and the express assignment of error.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE TRIAL COURT'S INSTRUCTIONS AT SENTENCING WHICH WERE TANTAMOUNT TO A DIRECTED VERDICT OF DEATH AFTER THE JURY RETURNED WITH A FINDING OF THE EXISTENCE OF AGGRAVATING CIRCUMSTANCES SUGGESTING NON-UNANIMITY.

After deliberating for almost 8 hours on the question of punishment, petitioner's jury returned a verdict of death based on special findings stated in the alternative.

The trial court refused to accept the verdict as rendered and required the jury to elect between the two aggravating circumstances. The court did not then instruct the jury that their finding must be unanimous nor did it instruct that they need not find either of the two circumstances. In effect, the trial court forced the jury to return a death sentence after the jury indicated that their special finding may not have been unanimous.

Under Section 19.2-264.4 of the Code of Virginia, 1950, as amended, the jury is provided special verdict forms. The form authorizes imposition of the death penalty where the jury, having found a defendant guilty of a capital offense, makes a specific finding of one of two aggravating factors. Both aggravating factors were argued by the Commonwealth to apply to petitioner.

The first aggravating factor concerns the probability that petitioner "would commit criminal acts of violence that would constitute a continuing serious threat to society." Section 19.2-264.2. The second aggravating circumstance required the jury to find that petitioner's "conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Id. The jury verdict form in petitioner's case was drafted to authorize the jury to find that petitioner constituted a serious threat to society "and/or" that his conduct satisfied the vileness standard. App. at 28a.

When petitioner's sentencing jury first returned to the court with a verdict, the trial judge refused to accept it because the foreman did not strike out the "and/or" in the verdict form. App. at 22a. The jury foreman responded,"I would strike out the and. It would be or." App. at 22a.

The trial judge, however, ordered that the jury reconsider its verdict, stating, "you have a choice of whether you found one way or the other way or both." App. at 22a-23a.

The jury again retired and returned with a verdict striking the word "and" in the form, thus again making a finding of aggravating circumstances in the alternative. The trial judge still refused to accept the verdict and gave the following instruction:

> As I instructed you, before you can impose the death penalty, it is necessary for you to make one or two findings. You don't have to find both; one or the other, or you can find both. The way the verdict is written with the or in it, you don't say which one. You would have to strike out the paragraph that was involved. So what I am saying to you, you have to make an election as to which one you did find that he did.
>
> App. at 24a.

Subsequent to this instruction, directing the jury to elect between the two circumstances, the jury retired yet again and finally returned with a verdict finding the existence of the vileness aggravating circumstance. Thus, petitioner was sentenced to death.

There was a two-fold problem with these instructions and the resulting jury findings. First, a verdict stated in the alternative does not clearly and unequivocally state the findings upon which the death penalty was based. In their initial two attempts, the jury found that petitioner was a continuing serious threat to society or that the conduct he engaged in was sufficiently vile. The verdict does not say which is found.

Nor do those attempted verdicts on their face assure that the jurors were unanimous in finding either of the two circumstances. Rather, it is equally possible, for example, that six of the jurors found for "vileness" and six for "future dangerousness." Where on the face of the verdict

itself it is impossible to determine whether there was unanimity on any special finding, the verdict should be set aside.

> Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases, the requirement of unanimity extends to all issues -- character or degree of crime, guilt and punishment -- which are left to the jury. A verdict embodies in a single finding the conclusions by the jury upon all questions submitted to it.
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> Andres v. United States, 333 U.S. 741, 748 (1948).

Further, under Virginia law petitioner was entitled to a unanimous verdict. Va. Const. art. I, §8.

While the issue concerning non-unanimous findings on aggravating circumstances has not been ruled upon by this Court, in Andres this Court interpreted the then existing federal death penalty statute which required the imposition of death in all murder cases unless the jury specifically found that capital punishment was not warranted. This Court held that before the ultimate punishment could be imposed, the jury must conclude unanimously that the defendant was guilty and separately must conclude unanimously that death should be imposed.

Indeed, particularly in capital cases, verdicts should be certain and unambiguous. Where the instructions on permissible sentences are in error, it is incumbent upon a reviewing court to resolve doubts in favor of the accused. Andres, 333 U.S. at 752. In a related context, this Court has held that if the jury has been instructed to consider several grounds for a conviction, one of which proves to be unconstitutional, and the reviewing court is thereafter unable to determine from the record whether the jury relied on the unconstitutional ground, the verdict must be set

aside. Bachellar v. Maryland, 397 U.S. 564 (1970); Stromberg v. California, 283 U.S. 359 (1931). This Court recognized a closely analogous problem in Zant v. Stephens, ___ U.S. ___, 102 S.Ct. 1856 (1982), where this Court was asked to decide whether a death sentence which is imposed on the basis of a plurality of aggravating circumstances should be set aside where one of those aggravating circumstances later is proven to be unconstitutional.

In petitioner's case it simply cannot be determined with the degree of certainty required in capital cases whether the disjunctive verdict first returned by the sentencing jury reflected a unanimous finding on either of the two aggravating circumstances. At most, such a verdict allows only one of two inferences: (1) that the jury unanimously concluded one or the other circumstance existed, or (2) some jurors found one circumstance and the remaining jurors found the other.

The error reflected in the disjunctive verdict was exacerbated by the instructions of the trial judge who refused to accept the verdict. The trial judge explicitly directed the jury to elect between the two circumstances. The jury was instructed to find one or the other, or both. At no time did the trial judge reinstruct the jury that their verdict concerning punishment need be unanimous. In effect, the trial judge directed at that time that a verdict of death be returned, even though there was sufficient reason to believe that the jury had failed to conclude unanimously that either of the circumstances existed.

Directed verdicts in criminal cases, of course, are totally unacceptable. United Brotherhood of Carpenters and Joiners of America v. United States, 330 U.S. 395, 408 (1947). Such a directive, whether express or implied, im-

properly invades the province of the jury. The coercive effect of the challenged reinstruction is apparent from the face of the record.

The death penalty may not be imposed under sentencing procedures that create an appreciable risk that the penalty will be inflicted in an arbitrary and capricious manner. Furman v. Georgia, 408 U.S. 238 (1972). There is no assurance that the jury in petitioner's case freely and fairly arrived at a unanimous verdict on the question of which of the two aggravating circumstances existed to satisfy the imposition of death. Because the penalty of death is qualitatively different from a sentence of imprisonment the need for reliability in the determination that death is the appropriate punishment is thereby heightened. Woodson v. North Carolina, 428 U.S. 280 (1976). The disjunctive verdict and the subsequent coercive instruction have stripped the death sentence imposed on petitioner of that reliability. Therefore, this Court should review this case as such review would have significant impact on the administration of the death penalty in this country.

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW WHETHER PETITIONER WAS DENIED DUE PROCESS WHERE THE ONLY EVIDENCE OF PENETRATION TO SUSTAIN CAPITAL MURDER BASED ON RAPE WAS HIS UNCORROBORATED "ADMISSION" TO A JAIL INMATE CALLED AS A SURPRISE WITNESS.

A. The evidence of capital murder based upon rape was so insufficient as a matter of law as to violate due process.

The Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). This principle was explicitly extended to state court proceedings in Jackson v. Virginia, 443 U.S. 307 (1979), in which this Court overruled the

previous "no evidence" standard under which a federal appellate court would review state court criminal convictions in favor of a standard encompassing the Winship requirements:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
>
> Jackson, 443 U.S. at 319 (emphasis in original).

The state trial court in petitioner's case ignored its mandate under Jackson by deciding, over the motion of defense counsel, tr. 663, that the rape case be submitted to the jury despite the fact that the evidence could not allow a rational trier of fact, under the law, to find the required element of penetration.

In Virginia, rape is statutorily defined, in relevant part, as:

> . . . sexual intercourse with a female [which is] accomplished (i) against her will, by force, threat or intimidation. . . 2/

Va. Code §18.2-61. To prove rape "the prosecution must prove that there has been an actual penetration to some extent of the male sexual organ into the female sexual organ." McCall v. Commonwealth, 192 Va. 422, 65 S.E.2d 540, 542 (1951). "It is not sufficient that facts and circumstances proven be consistent with petitioner's guilt. To sustain a conviction they must be inconsistent with every reasonable hypothesis of his innocence." McCall, 65 S.E.2d at 542, quoting Spratley v. Commonwealth, 154 Va. 854, 152 S.E. 362 (1930).

2/ The Court in Jackson, 443 U.S. at 324, n. 16, indicated that the constitutional review "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law."

In the light most favorable to the prosecution, the following evidence was produced in support of the rape charge which served as the predicate for petitioner's capital murder conviction. First, accomplice Johnson testified that he was in the bedroom with petitioner and the victim, Ms. Cubbage, when the alleged rape occurred and that he saw petitioner, his pants pulled down around his thighs, go onto the bed with Cubbage, at which time he heard Cubbage breathing hard and the bed squeaking. Tr. 359-360. Second, a single pubic hair, found by a prosecution witness to be "consistent" with Mr. Fitzgerald's, was found on Ms. Cubbage's bed sheet. Tr. 591, 597. Finally, Caviness, who was incarcerated in the same jail as petitioner as he awaiting trial, testified that petitioner said: "[I] screwed the woman and the pussy was so good to [me that I] cut it out and carried it home to have it to eat," in response to the inmate's inquiry as to why he "kill[ed] this woman and cut her up." 3/ Tr. 423.

The trial court apparently ignored the uncontradicted fact that there was no evidence of seminal fluid in the victim's vagina (or anywhere else) nor of petitioner's pubic hairs in her pubic area. Tr. 615. However, the court in McCall, 65 S.E. at 542, instructed:

> The absence of semen in the [victim's] genital organs or of stains therefrom on her clothing, while not conclusive of the fact, is a strong circumstance indicating that there was no attempted sexual intercourse.

3/ The insufficiency, as a matter of law, of this "admission" to prove penetration is discussed in detail, infra. Additionally, the due process violation connected with the prosecution's use of Caviness as a surprise witness is also detailed, infra.

Accord, Coles v. Peyton, 389 F.2d 224, 227, n.5 (4th Cir. 1968) (applying Virginia law). In view of the fact that the only tangible evidence concerning penetration showed that no penetration occurred, and the absence of other evidence, apart from the "admission," that could rationally show penetration beyond a reasonable doubt, the trial court erred in not granting a judgment of acquittal on the rape and capital murder charges.

The prosecution in petitioner's case attempted to supply the element of penetration through the only "evidence" it could muster; the "admission" purportedly made by petitioner to his fellow inmate. 4/ In Smith v. United States, 348 U.S. 147 (1954), this Court made it clear that the prosecution may not do so:

> The general rule that an accused may not be convicted on his own uncorroborated confession has previously been recognized by this Court [citations omitted], and has been consistently applied in the lower federal courts and in the overwhelming majority of state courts [citations omitted]. Its purpose is to prevent "errors in convictions based upon untrue confessions alone." [citation omitted].

This corroboration requirement applies with equal force to admissions. Opper v. United States, 248 U.S. 84 (1963).

In Wong Sun v. United States, 371 U.S. 471, 489, n. 15 (1963), this Court elucidated the corroboration requirement with respect to crimes involving physical damage to person or property:

4/ Even assuming, arguendo, that the words constituting this "admission" were spoken by petitioner, it is anything but clear that they were intended to be a truthful confession to the alleged rape or any element of the alleged rape. The words allegedly spoken by petitioner seem more likely to have been petitioner's misguided attempt at humor, or may have been intended to show anger with Caviness' question. Moreover, courts are mindful that the weight to be accorded a confession is necessarily dependent upon its quality and thus view factors such as its detailed nature as highly significant in determining its probative value. See e.g., United States v. Gresham, 585 F.2d 103, 106 (5th Cir. 1978). By any reasoned standards, petitioner's "admission" must be given little weight.

> Where the crime involves physical damage to person or property, the prosecution must generally show that the injury for which the accused confesses responsibility did in fact occur, and that some person was criminally culpable. A notable example is the principle that an admission of homicide must be corroborated by tangible evidence of death of the supposed victim. See 7 Wigmore, Evidence (3d ed. 1940), §2072, n.5.

Virginia law also requires that the "corpus delicti may not be proved by extra-judicial confession alone." Phillips v. Commonwealth, 202 Va. 207, 116 S.E.2d 282, 285 (1960). In applying that principle in connection with a sodomy conviction, the court in Phillips refused to allow the conviction to stand even in view of a lengthy written confession by Phillips and the fact that the co-defendant was in possession of Phillips' automobile, corroborating part of the confession. The court adopted the rule that "the coincidence of circumstances tending to indicate guilt however strong and numerous they may be, avails nothing unless the corpus delicti, the fact that the crime has been actually perpetrated, be first established." Id. 5/

Under the principles set forth by this Court and the Virginia Supreme Court it is clear that tangible evidence of the alleged penetration must be shown in order to sustain a rape conviction. By failing to require corroboration of the "admission," and by ignoring the scientific evidence strongly tending to demonstrate the absence of penetration, the trial court unconstitutionally denied petitioner due process of law. His capital murder conviction predicated upon rape, then, should be reviewed by this court and reversed.

5/ This rule has been applied with particular stringency with regard to sexual offenses. State v. Kraus, 230 S.E.2d 800 (N.C. App. 1977). See also 40 A.L.R. 460 ("Necessity and character of corroboration of confession of sexual offenses.")

B. The prosecution's use of a surprise witness necessary to sustain the capital murder-rape conviction and the sentence of death runs afoul of the due process clause.

The insufficiency of the evidence of rape in this case is compounded by the Commonwealth's constitutionally impermissible use of a surprise witness -- the jailhouse snitch -- by which the Commonwealth effectively and calculatedly subjected Mr. Fitzgerald to the death penalty in contravention of rights guaranteed by the Fifth, Eighth and Fourteenth Amendments. Undoubtedly, the use of the inmate was contemplated by the Commonwealth long before trial in an attempt to buttress the fundamental weakness of their evidence of rape. However, rather than divulge their scheme to use his testimony, so as to allow defense counsel to conduct the necessary investigation to challenge and discredit this highly suspect testimony, the prosecution elected to unveil their "bombshell" where its impact would be most devastating: in front of the jury at trial. This deliberate use of a surprise witness effectively shocked defense counsel and resulted in the inmate being only tenatively and inconsequentially cross-emamined [6/]. As a result, this unimpeached, inflammatory testimony had a two fold destructive effect: (1) it supplied to the jury a basis upon which they could convict Mr. Fitzgerald of rape, and thus supply the necessary predicate for the capital murder charge, [7/] and (2) the malignant nature of the alleged statement made by Mr. Fitzgerald to the inmate established to the jury that he was a man not fit to live.

In Gardner v. Florida, 430 U.S. 349 (1977), this Court reversed a death sentence because the judge who imposed it

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6/ The surprise created by this witness is well documented in the record. See Tr. at 660.

7/ Of course, as established supra, from any perspective this testimony could not sufficiently establish rape in this case.

acted partly on the basis of information that was not disclosed to the defendant or his counsel. This Court recognized that in an ordinary case such procedure might be acceptable, but specifically distinguished potential "death penalty" cases. "[F]ive members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country." Id. at 357. Accordingly, the Gardner Court, balancing the benefits of withholding the information against the costs, found that the advantages to the state -- obtaining information more easily, avoiding delay and preventing harm to the defendant's rehabilitation (if not executed) -- were overwhelmed by the damage to justice's overriding "interest in reliability." Id. at 358-60. See also Lockett v. Ohio, 438 U.S. 586, 604 (1978) (the difference between death and all other criminal sanctions calls for a greater degree of reliability when the death sentence is imposed).

Recognizing the fundamental error which this Court identified in Gardner -- defense counsel's inability to challenge or answer the evidence on which the death sentence is based -- the Fifth Circuit in Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979) aff'd 451 U.S. 454 (1981), held that the defendant's right to due process was denied where the state utilized a surprise witness in the sentencing phase of a death penalty case. 8/

In Smith the Fifth Circuit adopted the "balancing interests" analysis articulated by this Court in Gardner. The Fifth Circuit first focused on the adverse consequences of the use of a surprise witness:

> Surprise can be as effective as secrecy in preventing effective cross-examination, in denying

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8/ This Court affirmed the Fifth Circuit's opinion in Smith, but did not reach the issue presented here. Estelle v. Smith, 451 U.S. at 473, n.17. (All further references to Smith in this petition are to the Fifth Circuit's opinion.)

> the "opportunity for [defense] counsel to challenge the accuracy or materiality of evidence, Gardner v. Florida, 430 U.S. at 357, and in foreclosing 'that debate between adversaries [which] is often essential to the truth-seeking function of trials," id. at 360.
>
> Smith v. Estelle, 602 F.2d at 699.

In Smith the surprise witness was a psychiatrist who gave devastating testimony with regard to defendant's future dangerousness which, due to the surprise, could not be effectively responded to or impeached. Id. In the case sub judice, the surprise testimony was even more harmful because it not only provided the underpinnings for the jury's imposition of the death sentence upon Mr. Fitzgerald by purportedly showing his blood chilling lack of remorse, but also provided a substantive basis upon which he could be convicted of a capital offense. 9/

The Smith court viewed the justification for the use of a surprise witness and found that "the price of avoiding surprise was, at most, the insignificant cost of more regular and formal procedures." Id. at 700. The court observed:

> [T]he gains from informality and relaxed procedures cannot possibly outweigh the risk that the state may execute a person who would not have been sentenced to death if the jury had had 'full and accurate sentencing information'-'an indispensible prerequisite to a reasonable determination of whether defendant shall live or die.' Gregg v. Georgia, 428 U.S. 153, 190 (1976).

9/ Moreover, it is worth noting that in the instant case the Commonwealth was so successful in shielding the inmate's testimony that it came as an absolute surprise; in Smith the surprise testimony came from a psychiatrist who the defense attorneys knew had examined their client in connection with the case. 602 F.2d at 697.

Applying the rationale of Gardner and Smith to the instant case, it is clear that there was no substantial justification for the intentional use of the surprise witness while there were compelling and unmistakable reasons -- if the criminal justice system is truly concerned with the interest in reliability -- for not using surprise tactics. If this Court's admonition in Williams v. Florida, 399 U.S. 78, 82 (1970), that a criminal trial is not "a poker game in which players enjoy an absolute right always to conceal their cards until played," is to have any meaning, then surely the deliberate concealment until trial of devastating testimony by a jailhouse snitch to bolster an otherwise insufficient capital murder charge cannot be condoned.

III. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW WHETHER THE TRIAL COURT HAD AN AFFIRMATIVE DULY TO INQUIRE FURTHER OF DEFENSE COUNSEL WHEN IT HAD ACTUAL KNOWLEDGE OF A POTENTIAL CONFLICT OF INTEREST ON THE PART OF THAT COUNSEL.

Petitioner was denied due process of law and his Sixth Amendment right to counsel free from conflict of interest when his trial judge with actual knowledge of a possible disqualifing conflict of interest, failed to inquire further to determine whether an actual conflict of interest existed. Wood v. Georgia, 450 U.S. 261, 272 (1981). The conflict arose in petitioner's case because his lead trial counsel's wife, before and during the prosecution, was an administrator in the Office of the Commonwealth Attorney, petitioner's prosecutor. App. at 29a-30a. The attorneys for both the Commonwealth and for petitioner were aware of this potential conflict throughout the prosecution. Most significantly, the trial court knew of this conflict, yet did nothing other than informing petitioner of that fact, for the first time, shortly before trial.

In Wood, this Court held that where the trial judge knew that the petitioners charged with distributing obscene

literature, were represented by their employer's attorney and where the record indicated that the lawyers' strategy was seemingly more for the benefit of the employer than petitioner's, the court was under a duty to recognize the possibility of a disqualifying conflict and inquire further. Wood, 450 U.S. at 273. In the instant case the trial judge failed to take any action prior to or doing the trial to resolve the apparent conflict of interest other than merely inquiring of petitioner whether he was satisfied with counsel. The trial court did not inquire of defense counsel, the Commonwealth, petitioner or anyone else whether the conflict could result in a less vigorous defense. July 9, 1981 Motions Hearing, Tr. 23-24, App. 29a-30a.

It is generally recognized that an actual conflict of interest exists when a defense attorney places himself in a situation "inherently conducive to divided loyalties." Castillo v. Estelle, 504 F.2d 1243, 1245 (5th Cir. 1974). Moreover, certain situations involving a conflict of interest are so susceptible to bias as to demand a presumption that bias exists:

> [I]n certain situations a hearing may be inadequate for uncovering a juror's biases, leaving serious question whether the trial court had subjected the defendant to manifestly unjust procedures . . . [T]here are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that the juror is an actual employee of the prosecuting agency [or] that the juror is a close relative of one of the participants in the trial[ ].
>
> Smith v. Phillips, ___ U.S. ___, 102 S.Ct. 940, 948 (1982) (O'Connor, J., concurring).

See also Holloway v. Arkansas, 435 U.S. 475, 485, 486 (1978) (reversing conviction where trial court failed, despite defense request, to inquire into conflict of interest).

Various state bar association ethics committee opinions have dealt with other situations similar to this case and have found it per se improper for one spouse to seek to represent a defendant prosecuted by the other spouse or a member of the staff of the public office which employs the spouse. Spouses and Conflict of Interest, 52 Den. L.J. 735, 748 (1975). These decisions were based on the "realities of the marital relationship" and the inherent possibility that the domestic and professional responsibilities of defense counsel and prosecutor might be on a collision course when they represent conflicting interests. See, Arizona Ethics Committee Opinion No. 73-6 (1973), Illinois State Bar Association Professional Ethic Opinion No. 311 (1968).

Moreover, in a civil matter the Virginia Bar Association Legal Ethics Committee stated that it would be unethical to allow a husband and wife to represent opposite sides of a divorce proceeding. 52 Den. L.J. 735, 769 (1975) (Appendix B). The opinion stated in relevant part:

> Every client has the right to expect his lawyer's totally independent judgment and undivided loyalty. (EC 5-1). Every lawyer should zealously guard against any personal interest or involvement which might impair in any way his total, unrestrained dedication to his client's cause. (EC 5-2). And every client must feel free to discuss whatever he wishes with his lawyer. There should be no question of his lawyer's integrity in keeping these confidences inviolate, and the client should feel no inhibition whatever in making such revelations to his lawyer. (EC 4-1). To allow a husband and wife to advocate opposing positions in the same controversy, in the opinion of our Committee, tends to compromise these well-established principles of professional ethics.

The undivided loyalty required of petitioner's defense attorney must be questioned where his wife's livlihood or other aspects of her employment might be affected or jeopardized as a result of his actions. In view of the acute requirement for fairness in capital cases, and the failure of the trial court, despite actual knowledge of the conflict, to conduct the inquiry mandated by Wood, petitioner urges that his conviction be reviewed and reversed by this Court.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia in Fitzgerald v. Commonwealth, ___ Va. ___, 292 S.E.2d 796 (1982).

Respectfully submitted,

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Edward Benton FITZGERALD

v.

COMMONWEALTH of Virginia.

82 5853

Record No. 811653.

Supreme Court of Virginia.

June 18, 1982.

Defendant was convicted in the Circuit Court, Chesterfield County, Ernest P. Gates, J., of capital murder, armed robbery, rape, abduction with intent to defile, and burglary, and he appealed. The Supreme Court, Cochran, J., held that: (1) there were no errors in pretrial proceedings with respect to motion to suppress evidence and qualifications of jurors; (2) during the guilt trial testimony of a physician and the report of the medical examiner were admissible; (3) there was evidence from which the jury could find that the defendant possessed the intent to commit capital murder; (4) the instructions on "intent to sexually molest" were not erroneous; (5) defendant was not subjected to double jeopardy when sentenced for felonies underlying his conviction of capital murder; (6) representation received by defendant was not inadequate due to an alleged conflict of interest; (7) capital murder statute on which defendant was convicted was not unconstitutional on its face; and (8) sentence of death was neither excessive nor disproportionate.

Affirmed.

1. Criminal Law ⇐394.5(4)

While the burden was on the Commonwealth to show that consent to a warrantless search of defendant's bloodstained shoes was freely and voluntarily given, the suppression hearing was not fatally flawed because the trial court, with the acquiescence of defense counsel, imposed the burden on defendant of proving that the warrantless seizure itself was unreasonable. U.S.C.A.Const.Amend. 4.

2. Criminal Law ⇐394.5(4)

There was evidence from which the trial court could conclude at the suppression hearing that the defendant's bloodstained shoes were voluntarily delivered to the interviewing police officer. U.S.C.A.Const. Amend. 4.

3. Searches and Seizures ⇐3.3(4)

Where a police officer, with justification for being on the premises, is not searching for evidence against the accused but inadvertently comes across incriminating evidence, he may seize it without a warrant under the "plain view" exception. U.S.C.A.Const.Amend. 4.

4. Searches and Seizures ⇐3.3(4)

The warrantless seizure of the defendant's bloodstained shoes could have upheld under the "plain view" exception to the warrant requirement since the trial court could reasonably conclude from the evidence that when the police officer was interviewing defendant, he was not searching for physical evidence against the defendant and merely through inadvertance observed what appeared to be incriminating bloodstains on defendant's shoes. U.S.C.A.Const. Amend. 4.

5. Criminal Law ⇐394.5(5)

A trial court is not required to give findings of fact and conclusions of law in a suppression hearing in absence of a statutory mandate. U.S.C.A.Const.Amend. 4.

6. Jury ⇐108

Refusal to strike two veniremen as "death prone" was not error where each veniremen assured trial court that he would not vote for the death penalty if the defendant were convicted of capital murder except in accordance with the trial court's instructions.

7. Jury ⇐108

Though one veniremen answered affirmatively when asked by defense counsel if he believed that because defendant had been arrested and indicted he must be "involved" in charges for which he was being tried, where veniremen subsequently gave assurances upon further questioning that in

event of a capital murder conviction he would consider evidence in determining an appropriate sentence and would not automatically vote for death penalty, refusal to strike that veniremen as "death prone" was not an abuse of discretion.

8. Criminal Law ⇐469

An expert witness may express an opinion upon matters not within common knowledge or experience of jury.

9. Criminal Law ⇐472

Opinion of physician in answer to hypothetical question, that ingestion of various quantities of LSD, Tranxene, and beer could not cause a person to commit certain specified acts of violence or render a person incapable of having intent to commit such acts, involved a subject on which jurors could not be expected to be knowledgeable and was admissible.

10. Criminal Law ⇐742(1)

The credibility of witnesses must be left to the jury just as the determination of guilt or innocence.

11. Coroners ⇐22

Statute providing exception to the hearsay rule by permitting investigation and autopsy reports of the chief medical examiner or his assistants to be received in evidence without requiring the investigating official to testify cannot be construed to require an election by the Commonwealth to introduce the relevant evidence either by a qualified witness or by the written reports. Code 1950, § 19.2-188.

12. Criminal Law ⇐1163.1(10)

Error, if any, in admitting the report of the deputy medical examiner and the autopsy report which he prepared without requiring the examiner to testify was harmless beyond a reasonable doubt where there was nothing of substance in the reports that unchallenged evidence had not already made a part of the record. Code 1950, § 19.2-188.

13. Homicide ⇐28

One who is so greatly intoxicated as to be unable to deliberate or premeditate cannot be convicted of a class of murder that requires proof of willful, deliberate, and premeditated killing.

14. Homicide ⇐28

Mere intoxication from drugs or alcohol is not sufficient to negate premeditation.

15. Homicide ⇐28

Although there was evidence that the defendant was intoxicated from drugs or alcohol or the combined effect of both, where there was also evidence from which the jury could have reasonably found that defendant was in full control of his faculties and knew exactly what he intended to do, it could not be said that defendant was so greatly intoxicated by voluntary use of alcohol and/or drugs that he was incapable of deliberating or premeditating and, hence, could not be found guilty of either capital murder or murder in the first degree.

16. Kidnapping ⇐1

The words "with the intent to sexually molest" contained in the instructions and the words "with the intent to defile" contained in the statute under which the defendant was charged were interchangeable in their common reference to sexual relations. Code 1950, § 18.2-48.

17. Kidnapping ⇐6

Instructions which employed the words "with the intent to sexually molest" instead of the words "with the intent to defile" contained in the statute under which the defendant was charged was not erroneous as broadening the definition of "defile." Code 1950, § 18.2-48.

18. Criminal Law ⇐808

It is permissible to draft instructions in the language of the applicable statute, but it is not obligatory to do so if the meaning of the law is not changed by the language used.

19. Criminal Law ⇐809
Homicide ⇐306

Instruction defining principals in the second degree, insofar as it required the jury to find, in respect to noncapital charges, that defendant was guilty even if

he was found to be only a principal in the second degree, but, in respect to the capital charge, permitted jury to find that defendant was not guilty of capital murder if he was found not to be the one who struck the blows that killed the victim, injected a diluting element into the legal principles controlling a jury's consideration of the elements relating to the defendant's role in the slaying and, as such, was not erroneous as confusing, misleading, incomplete, ambiguous and unsupported by any indictment or evidence.

20. Criminal Law ⇐161, 186, 187

Double jeopardy affords protection against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishment for the same offense. U.S.C.A.Const. Amends. 5, 14.

21. Criminal Law ⇐200(1)

The double jeopardy test under *Blockburger* is used to resolve double jeopardy issues when the defendant is convicted at a single trial of multiple offenses arising out of the same transaction and the authorized legislative punishment are less than plain, but it is unnecessary to apply the test when the General Assembly has clearly indicated its intent to impose multiple punishment. U.S.C.A.Const.Amends. 5, 14.

22. Criminal Law ⇐200(7)

The right of the defendant under the double jeopardy clause was not violated when he was sentenced for the felonies of rape and robbery underlying his conviction of capital murder in absence of a showing that it was the intent of the General Assembly to eliminate punishment for other offenses included in the murder statute solely for the purpose of categorizing the murder. Code 1950, § 18.2-31(d, e); U.S.C.A.Const.Amends. 5, 14.

23. Criminal Law ⇐641.5

Potential conflict of interest brought on by defense counsel's previous employment in the Commonwealth attorney's office was insufficient to establish inadequacy of defendant's representation in absence of a showing as to how employment of defense counsel's wife could have compromised defense counsel or prejudiced defendant. U.S.C.A.Const.Amend. 6.

24. Constitutional Law ⇐258(3)
Homicide ⇐351

Provisions of the capital murder statute are not unconstitutional under either the Fifth or Fourteenth Amendments or under the Constitution of Virginia. Code 1950, §§ 19.2-264.2, 19.2-264.4, subd. C.

25. Criminal Law ⇐1186.1

The sum of the numerous alleged errors which were found to be meritless on appeal from conviction did not constitute reversible error.

26. Homicide ⇐354

Sentence of death imposed on conviction of capital murder, armed robbery, rape, abduction with intent to defile, and burglary was neither excessive nor disproportionate when based upon finding that defendant's conduct in committing capital murder was outrageously or wantonly vile, horrible or inhuman, and involved torture, depravity of mind and exaggerated battery to victim. Code 1950, §§ 19.2-264.2, 19.2-264.4, subd. C.

Frank N. Cowan, Richmond (W. Joseph Owen, III, Deborah S. O'Toole, Cowan, Owen & Nance, Richmond, on brief), for appellant.

Robert H. Anderson, III, Asst. Atty. Gen. (Gerald L. Baliles, Atty. Gen., on brief), for appellee.

Before CARRICO, C. J., and COCHRAN, POFF, COMPTON, THOMPSON, STEPHENSON and RUSSELL, JJ.

COCHRAN, Justice.

A jury found Edward Benton Fitzgerald guilty of the capital murder of Patricia Cubbage;[1] armed robbery; rape; abduc-

1. The two-count indictment for capital murder charged Fitzgerald with the willful, deliberate

tion with intent to defile; and burglary. For each of the offenses other than capital murder, the jury fixed Fitzgerald's punishment at confinement in the penitentiary for life. In the second part of the bifurcated proceeding required by Code §§ 19.2-264.3 and -264.4 in the capital murder case, the same jury fixed Fitzgerald's sentence at death. After considering the probation officer's report filed pursuant to Code § 19.2-264.5, the trial court imposed the death sentence by order entered September 4, 1981, and on the same date, entered judgment on the other jury verdicts.

Fitzgerald seeks a reversal of all his convictions and remand for a new trial. Having consolidated the automatic review of his death sentence with his appeal from his convictions, we have given them priority on our docket.

Daniel L. Johnson, the codefendant charged with the same offenses as Fitzgerald, related the relevant facts as the principal witness for the Commonwealth. On the afternoon of November 13, 1980, he and Fitzgerald were drinking beer at Fitzgerald's apartment when Don Henn, Patricia Cubbage, and Angelia Robinson arrived. According to Johnson, they drank beer and smoked marijuana which Cubbage had supplied.

That evening, fifteen or twenty minutes after Henn, Cubbage, and Robinson left the apartment, Fitzgerald received a telephone call from a friend who was subsequently identified as David Bradley. At Fitzgerald's request, Johnson agreed to drive him to the friend's apartment in Sandston; anticipating trouble, Fitzgerald produced a machete which Johnson strapped on himself. As they proceeded to Sandston in Johnson's car, the men consumed several pills from a baggie in Fitzgerald's possession, but Johnson could not remember what kind of pills Fitzgerald told him they were taking. They found no trouble when they arrived at Bradley's apartment. Fitzgerald and Bradley discussed a legal paper that Bradley had received; Johnson and Bradley each drank a beer.

When Fitzgerald and Johnson left Bradley and his wife about midnight, Bradley gave Fitzgerald a cellophane bag. Before driving off, Johnson returned the machete to Fitzgerald. During the drive, Fitzgerald said that there was "acid" (lysergic acid diethylamide, or LSD) in the cellophane bag; Johnson declined to take any, but Fitzgerald "took a hit of it." Subsequently, Johnson heard Fitzgerald "mumbling" that Cubbage "had ripped him off."

At Fitzgerald's suggestion, the pair decided to steal some drugs from Henn's residence. Parking nearby, they found the house locked. Fitzgerald failed to pry open a door with Johnson's lug wrench, but the men gained entrance by kicking in the door. Johnson knew of one area on the premises where drugs were kept, and he knew that Cubbage was a drug dealer. While searching in the living room, he heard Fitzgerald run up the stairs leading from the lighted hallway. A woman's voice, which Johnson recognized as Cubbage's, asked Fitzgerald why he was there. When Cubbage screamed, Johnson ran upstairs and saw Cubbage nude, on her knees on the floor, apparently stunned, with a cut over her left eye. Johnson helped her into bed and attempted to leave, but Fitzgerald pushed him against the wall, pressed the machete to his throat, and ordered him to remain.

Although Cubbage protested that she was menstruating, and Johnson saw evidence of this, Fitzgerald had sexual intercourse with her. He then struck her several times with the machete, almost cutting off her thumb when she attempted to ward off his blows. At Fitzgerald's command, Johnson helped Cubbage to dress. Cubbage twice asked Fitzgerald to take her to a hospital, but he refused, explaining after her second request that he had come there "to do a job and he was going to finish it." As the men led Cubbage from the bedroom, Fitzgerald seized her purse. They went through the

and premeditated killing of Patricia Cubbage in the commission of robbery while armed with a deadly weapon (Code § 18.2-31(d)) and during the commission of, or subsequent to, rape (Code § 18.2-31(e)). The jury found him guilty under both counts.

kitchen, where Fitzgerald stopped long enough to break the glass in a microwave oven and take some luncheon meat from the refrigerator, and left in Johnson's car, with Johnson driving and the other two riding in the back seat.

Following Fitzgerald's directions, Johnson drove down a remote dirt road, parked near some woods, and extinguished the car lights. Fitzgerald threw Cubbage's clothes behind the car. Johnson led Cubbage a short distance into the woods, where Fitzgerald pushed her to her hands and knees and forced her to engage in oral sodomy with him until she said she could not continue because of blood in her mouth. Fitzgerald struck her with the machete, and Cubbage said, "God, please just blow my brains out and get it over with ...." Fitzgerald proceeded to mutilate her by stabbing and slashing her repeatedly, from head to feet, front, sides, and back, including both eyes, as well as genital and rectal areas, with the machete and with a knife that he removed from his wallet.[2] Fitzgerald then "kicked her a few times," before he and Johnson covered her dead body with leaves.

Asked why he had done the things to which he had testified, Johnson replied that he was afraid that Fitzgerald, who was "tripping" from the LSD, would kill him if he did not cooperate. Johnson maintained that he was "too scared to run," that he did not remember "being so frightened" in his life.

As they went back to the car, Johnson said, Fitzgerald asked him if he wanted to forget what had happened, and when he replied in the affirmative, gave him some "acid," which he consumed. They drove to a dumping area, where Fitzgerald, looking in Cubbage's purse, found several medicine bottles, one pill, two syringes, and a "dime" of marijuana. Fitzgerald kept the pill, divided the marijuana with Johnson, and threw the purse with its remaining contents on the ground. They returned to Fitzgerald's apartment, where Fitzgerald handed the machete and knife to his wife. There was blood on Johnson's face, arm, and tennis shoes, and on Fitzgerald's hands and arms. Fitzgerald put his own clothes in the washing machine. Johnson went to the bathroom and vomited before washing off the blood; he left his tennis shoes and clothes for Fitzgerald to wash.

Informing Johnson that he was "now a one percenter," Fitzgerald tattooed on Johnson's arm the "one percenter mark" which, he told Johnson, meant that the person who wore it "was a total outlaw and had no respect for the law whatsoever and didn't care for anyone but himself." Johnson knew of "one biker group" that used this tattoo and he knew that Fitzgerald wore one. He exhibited his mark to the jury.

Angelia Robinson testified that about 8:30 p. m. on November 13, she, Cubbage, and Henn went to Fitzgerald's apartment. She described Fitzgerald as "drunk" at that time; he was drinking beer. About 10:00 p. m. Robinson, Cubbage, and Henn left the apartment and went to a restaurant for "a couple of drinks." Cubbage was tired, so Robinson and Henn took her back to Henn's house, where Henn, his wife, who was away on a business trip, Robinson, and Cubbage resided, and Cubbage went to bed. Robinson telephoned to her "agency," found that she had a "call," and left with Henn for Richmond about 12:30 a. m.; when they returned about 3:00 a. m. and discovered that Cubbage was missing and that there were bloodstains throughout the house, they called the police.

Henn testified that on the evening of November 13, he was given capsules of Tranxene, "a mild tranquilizer," by Fitzgerald's wife, Bonnie. At Fitzgerald's request, Henn gave him five or six of these capsules.

In driving to the Henn residence in response to the report of Cubbage's disappearance, Officer James W. Stanley, of the

2. The medical examiner testified that he counted a minimum of 184 stab and cut wounds, that death was caused by loss of blood, and that all the wounds were inflicted before death. In his opinion, the wounds were consistent with Fitzgerald's knife, and more than one weapon could have been used.

Chesterfield County Police Department, recognized Johnson's car as it emerged from a side street near a dumping area. He had often seen the car parked at night near Johnson's apartment, but he had never before seen it in operation at such an hour. He found, upon inquiring into Cubbage's activities on the evening of November 13, that she had been in a group that included Johnson. Returning to the area where he had observed Johnson's car, the officer searched until he found Cubbage's purse with its contents scattered nearby. On the same afternoon, November 14, Cubbage's body was discovered; shortly thereafter, Johnson and Fitzgerald were arrested and charged with capital murder.

The Commonwealth introduced into evidence color photographs of Cubbage's bedroom, Johnson's automobile, and the place where Cubbage's body was found. Commonwealth exhibits included Cubbage's purse and its contents, her clothing and glasses, Fitzgerald's knife, which had been found hidden in his apartment, Fitzgerald's tattoo kit, pubic hair samples consistent with Fitzgerald's found in Cubbage's bed, and bloody floor mats and a bloody newspaper from Johnson's car. The trial court, excluding color photographs of Cubbage's body, admitted black-and-white photographs of the body.

Wilbur H. Caviness, who had been an inmate in the Chesterfield County Jail while Fitzgerald was confined there pending trial, testified that he asked Fitzgerald why he would do such a thing as "kill this woman and cut her up." According to Caviness, Fitzgerald stated that he had had intercourse with her and cut up her genital area because she "snitched on him and snitched on a friend of his also." There was evidence that Cubbage was a police informer and that an informer is sometimes referred to as a "snitch."

Forensic evidence established that the blood found on the floor mats and newspaper in Johnson's car, on his tennis shoes, and on Cubbage's blue jeans was the same type as that of Cubbage in each of the six systems analyzed. Blood on Fitzgerald's shoes could be analyzed in only three systems, but it was the same type as Cubbage's and different from that of Johnson and Fitzgerald.

The Commonwealth presented Dr. Robert V. Blanke, Director of the toxicology laboratory and professor of pharmacology at the Medical College of Virginia as an expert witness to testify to the effect of certain drugs. He answered a hypothetical question based on the facts adduced by the Commonwealth's evidence against Fitzgerald by stating that none of the described actions was characteristic of the effects of LSD, and that the hypothetical individual could not have carried out those actions as a result of the influence of LSD, Tranxene, or alcohol. In his opinion, none of the three drugs, regardless of dosage, could have produced the described behavior.

David Bradley and Lenore Bradley, his wife, testified as witnesses for Fitzgerald. They said that Johnson was sober; that he drank only half a beer at their apartment while Fitzgerald had two or three beers; that the two men came at 10:30 p. m. and left at 1:20 a. m.; and that Bradley gave them vacuum cleaner bags for Fitzgerald's wife but no drugs. Bradley described Fitzgerald as "a little bit drunk." His wife said that Fitzgerald seemed to be his "regular self when he was drinking," which meant to her that he looked as if he might "pass out."

Dr. William M. Lordi, a psychiatrist, testifying as an expert witness for the defense, described Fitzgerald as a chronic alcoholic with a paranoid personality, who had used LSD and other drugs since the age of twelve. He characterized Tranxene as a mood depressant; if the dosage is insufficient to make a person comatose, mental functions become "dulled or knocked out" and yet he may still be ambulatory. LSD is "very dangerous" and is used, Dr. Lordi said, to "escape the world." Use of LSD with a large quantity of beer would increase the effect of the LSD, so that the person's ability to plan would be poor, and the result might be "explosive laughter" or it might be unpredictable violence. When

asked on cross-examination whether the man described in the hypothetical question submitted to Dr. Blanke was incapable of forming an intent, and was incapable of premeditating and planning the actions described, he replied in the negative.

In the sentencing phase of the trial, the Commonwealth introduced into evidence, over objection, color photographs of Cubbage's body. The Commonwealth also presented a record of Fitzgerald's conviction in Richmond in 1979 for unlawful wounding. The officer who investigated that offense testified that Fitzgerald was charged with aggravated assault against his wife, Bonnie Fitzgerald, and use of a firearm in the commission of that felony. Fitzgerald told the officer that he had shot his wife when he came upon her and a friend of his engaging in sexual intercourse on the living room floor in the Fitzgerald apartment. Under a plea bargaining agreement, Fitzgerald pleaded guilty to the lesser offense of unlawful wounding. There was evidence that the Fitzgeralds were still living together at the time of the Cubbage slaying, that Bonnie Fitzgerald was confined to a wheelchair, and that she had a supply of prescription Tranxene.

Fitzgerald did not testify in the sentencing proceeding. The record shows that in declining to testify at this stage, he rejected the recommendation of his attorneys.

Of the 27 alleged errors assigned by Fitzgerald, several, including one based upon the admission into evidence of the color photographs of Cubbage's body, were not pursued on brief or in oral argument. We will treat such errors as waived and will not consider them in this opinion.

I. Pretrial Proceedings.

A. Motion to Suppress Evidence.

Fitzgerald filed a motion to suppress all evidence obtained from him without his consent. At the pretrial hearing on his motion, however, he sought to exclude only a pair of his shoes.

Fitzgerald testified that Lieutenant H. M. Shelton interviewed him on November 14, and asked for his shoes. Fitzgerald said that he did not give the shoes to Shelton voluntarily but only under threat of arrest.

Shelton testified that on the morning of November 14 he and other officers had seized as evidence bloodstained items from Johnson's car. They learned from Johnson that he had been out all night with Fitzgerald and had left his clothes at Fitzgerald's apartment. Shelton and another officer proceeded without an arrest or a search warrant to the Fitzgerald apartment, found Bonnie Fitzgerald there, advised her of her constitutional rights, took a statement from her, and recovered Johnson's tennis shoes.

Shelton said that while he was at the apartment Fitzgerald returned on a motorcycle; the officer interrogated him at 1:33 p. m. after Fitzgerald had signed a waiver of his *Miranda* rights. The interview was conducted prior to discovery of Cubbage's body. Fitzgerald admitted having been with Johnson all night. During the interview, noticing what appeared to be bloodstains on Fitzgerald's shoes, Shelton asked Fitzgerald to give him the shoes as evidence. According to Shelton, Fitzgerald at first asked him to take another pair, but then removed and delivered to the officer the shoes that were requested. Shelton said that he did not threaten to arrest Fitzgerald but conceded that he would not have left without the shoes, even if it had been necessary to arrest him.

[1, 2] We reject Fitzgerald's argument that the suppression hearing was fatally flawed because the trial court, with the acquiescence of Fitzgerald's counsel, imposed the burden on Fitzgerald of proving that the warrantless seizure of his shoes was unreasonable. We construe the court's position to be no more than the usual requirement that Fitzgerald, as the moving party, go forward with evidence in support of his motion. The burden is on the Commonwealth to show, for example, that consent to a warrantless search is freely and voluntarily given. *Hairston v. Commonwealth*, 216 Va. 887, 888, 219 S.E.2d 668, 669 (1975), *cert. denied*, 425 U.S. 937, 96 S.Ct. 1671, 48 L.Ed.2d 179 (1976). Although the

trial court did not specify the basis for overruling the motion to suppress, there was evidence from which the court could conclude that the shoes were voluntarily delivered to Shelton. Such a conclusion must be accepted by us on appeal unless clearly erroneous. *Stamper v. Commonwealth*, 220 Va. 260, 268, 257 S.E.2d 808, 814 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980).

[3, 4] If, as the Commonwealth suggests, the trial court relied on the "plain view" exception to the warrant requirement, the same result was properly reached. Where a police officer, with justification for being on the premises, is not searching for evidence against the accused but inadvertently comes across incriminating evidence, he may seize it without a warrant. *Lugar v. Commonwealth*, 214 Va. 609, 612, 202 S.E.2d 894, 897 (1974); *cf. Holloman v. Commonwealth*, 221 Va. 947, 275 S.E.2d 620 (1981). Fitzgerald concedes that Shelton was lawfully on the premises. The trial court reasonably could infer from the evidence that Shelton was in the Fitzgerald apartment to search for and seize the clothes which Johnson had admitted leaving there. Likewise, the court reasonably could conclude that when Shelton was interviewing Fitzgerald, he was not searching for physical evidence against him and merely through inadvertence observed what appeared to be incriminating bloodstains on Fitzgerald's shoes.

[5] Absent a statutory mandate, such as that applicable in habeas corpus proceedings, Code § 8.01-654(B)(5), a trial court is not required to give findings of fact and conclusions of law. Regardless of the basis for its decision, therefore, we hold that the trial court did not err in overruling Fitzgerald's motion to suppress the shoes which were subsequently introduced into evidence against him.

B. Qualifications of Jurors.

Fitzgerald says that the trial court should have stricken for cause three veniremen, Horace Elwin Hackney and Hampden S. Mann, Jr. for being "death prone," and Arthur Griffin for not being disinterested and unbiased. We disagree.

On *voir dire*, Hackney and Mann responded affirmatively when asked whether a person should be given the death penalty if he has the intent to kill a victim and kills during the commission of a robbery or rape. In each instance, the prospective juror had given satisfactory answers to the questions propounded by the trial court pursuant to Rule 3A:20(a), and to questions propounded by opposing counsel, and had told the court that he did not feel that every person convicted of murder should receive the death penalty. After the answers now in issue had been given, the court explained the factors to be considered in the sentencing phase of the trial before the death penalty could be imposed and asked Hackney and Mann, in separate inquiries, whether they would follow the court's instructions. Each answered without equivocation that he would.

The trial court stated that the question as propounded was misleading because it did not include everything that should be taken into consideration in imposing the death sentence, and requested that defense counsel thereafter "modify the question" to avoid misunderstanding. Defense counsel acceded to this request without objection.

[6] To determine whether these prospective jurors should have been excluded for cause, we have reviewed their entire *voir dire* rather than the single question and answer. *See L. E. Briley v. Commonwealth*, 222 Va. 180, 182, 279 S.E.2d 151, 152-53 (1981). From our review, we conclude that Hackney and Mann showed an earnest desire and willingness to decide the case, both as to guilt and as to punishment, on the basis of the evidence presented, that they understood that the Commonwealth had the burden of proof, and that Fitzgerald was presumed to be innocent and was not required to testify or to present any evidence. Each assured the court that he would not vote for the death penalty, if Fitzgerald were convicted of capital murder, except in accordance with the court's instructions.

[7] On *voir dire*, after giving satisfactory answers to the court's questions and to numerous questions propounded by opposing counsel, Griffin answered affirmatively when asked by defense counsel if he believed that because Fitzgerald had been arrested and indicted he must be "involved" in the charges for which he was being tried. Subsequently, he amplified his answer by saying that when he used the word "involved" he thought that Fitzgerald "would have to know someone or some kind of way be involved." Upon further questioning by defense counsel, Griffin gave assurances that in the event of a capital-murder conviction he would consider the evidence in determining an appropriate sentence and would not automatically vote for the death penalty. He also responded affirmatively to the court's question whether he understood that an indictment is not evidence of guilt. After reviewing the *voir dire* in its totality, we hold that there is no merit in Fitzgerald's objection and that the court did not abuse its discretion in seating Griffin.

II. The Guilt Trial.

A. Admissibility of Evidence.

1. Testimony of Dr. Robert V. Blanke.

Fitzgerald contends that the trial court erred in permitting Dr. Blanke to answer the hypothetical question propounded to him as an expert witness for the Commonwealth. In answering the question, Fitzgerald says, Dr. Blanke invaded the province of the jury by deciding the ultimate issue in the case.

[8, 9] An expert witness may express an opinion upon matters not within the common knowledge or experience of the jury. *Carter v. Commonwealth*, 219 Va. 516, 519, 248 S.E.2d 784, 786 (1978). Dr. Blanke testified, without objection, to the individual and cumulative effects of LSD, Tranxene, and alcohol. In answering the hypothetical question, the expert expressed his opinion that the ingestion of various quantities of LSD, Tranxene, and beer could not cause a person to commit certain specified acts of violence or render a person incapable of having the intent to commit such acts. This was a subject in which jurors could not be expected to be knowledgeable.

[10] The credibility of witnesses was left to the jury, as was the determination of guilt or innocence. The jury was entitled to have the benefit of expert opinion as to the cumulative effect of LSD, Tranxene, and alcohol, in answer to a hypothetical question based upon evidence in the record. The hypothetical question that we held to be inadmissible in *Coppola v. Commonwealth*, 220 Va. 243, 252–53, 257 S.E.2d 797, 803–04 (1979), *cert. denied*, 444 U.S. 1103, 100 S.Ct. 1069, 62 L.Ed.2d 788 (1980), was not only cumulative but was intended to show that a named witness could not be believed. Although we acknowledged that a properly drafted hypothetical question could have addressed the subject of a personality disorder in the witness, we upheld the trial court's exclusion of the question as framed. In the present case, the expert did not attempt to express an opinion as to the veracity of any witness, and we hold that the trial court did not err in admitting his testimony.

2. The Report of the Medical Examiner and the Autopsy Report.

Fitzgerald argues that since Dr. William Massello, III, Deputy Medical Examiner, testified as a witness for the Commonwealth, the trial court erred in admitting the report of his investigation and the Autopsy Report which he prepared. Fitzgerald says that these reports unfairly emphasized the gruesome details of the murder and contained inadmissible hearsay. We hold that there is no merit in Fitzgerald's argument.

[11] Code § 19.2-188 provides a statutory exception to the hearsay rule by permitting investigation reports and autopsy reports of the Chief Medical Examiner or his assistants to be received in evidence without requiring the investigating official to testify. *See Bass v. Commonwealth*, 212 Va. 699, 187 S.E.2d 188 (1972). There is no preclusive language in the statute barring

introduction of the reports if the investigating official testifies; we decline to construe the statute to require an election by the Commonwealth to introduce the relevant evidence either by a qualified witness or by the written reports.

[12] As to the hearsay objection, we hold that any error in admitting portions of the report containing inadmissible opinions, *Ward v. Commonwealth*, 216 Va. 177, 217 S.E.2d 810 (1975), was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, *reh. denied*, 386 U.S. 987, 87 S.Ct. 1233, 18 L.Ed.2d 241 (1967). There was nothing of substance in the reports that unchallenged evidence had not already made a part of the record. Fitzgerald's defense was that he did not commit the capital murder, or, if he did, that because of drugs and alcohol he did not have the requisite intent and could not be held legally responsible. He did not deny that multiple stab wounds caused Cubbage's death, or that she was abducted and killed during the commission of rape and robbery. He merely denied that he was the culprit.

B. Whether as a Matter of Law Fitzgerald Lacked the Intent to Commit Capital Murder.

The trial court gave Instruction No. 26, which informed the jury that if it found that Fitzgerald was "so greatly intoxicated by the voluntary use of alcohol and/or drugs that he was incapable of deliberating or premeditating" he could not be found guilty of either capital murder or murder in the first degree. Fitzgerald says that the court should have ruled as a matter of law that he was incapable of deliberating or premeditating. We do not agree.

[13-15] One who is so greatly intoxicated as to be unable to deliberate and premeditate cannot be convicted of a class of murder that requires proof of a willful, deliberate, and premeditated killing. *Johnson v. Commonwealth*, 135 Va. 524, 531, 115 S.E. 673, 675-76 (1923). Mere intoxication from drugs or alcohol, however, is not sufficient to negate premeditation. *Giarratano v. Commonwealth*, 220 Va. 1064, 1073, 266 S.E.2d 94, 99 (1980). In the present case, as in *Giarratano*, there was evidence that the defendant was intoxicated from drugs or alcohol, or the combined effect of both. There was also evidence from which the jury reasonably could find that Fitzgerald was in full control of his faculties and knew exactly what he intended to do.

Fitzgerald's complaints about Cubbage on the ride back from the Bradleys', his announced intention to "finish the job" rather than take Cubbage to a hospital, his instructions to Johnson to assist Cubbage and to drive on a specified route to the remote spot where she was slain, and his actions after the killing were evidence that he was in command of the criminal enterprise and carried out a planned operation. Fitzgerald arranged for his clothes and those of Johnson to be washed, and he insisted upon tattooing a mark on Johnson's arm to establish that, by accompanying Fitzgerald on this night of violence, Johnson had earned admission to the company of outlaws. Moreover, the testimony of Caviness, if believed, supplied not only a tacit admission by Fitzgerald that he had mutilated and killed Cubbage, but a motive for his doing so.

Dr. Blanke testified that a person could not have been caused to perpetrate the acts described in the hypothetical question by LSD, Tranxene, or alcohol, or a combination of the three. Dr. Lordi, the expert defense witness, could not say that a person who had ingested quantities of LSD, Tranxene, and alcohol was incapable of premeditating and intending his acts. Thus, Fitzgerald's condition was an issue of fact to be resolved by the jury and there was ample evidence to support the jury's finding that he had the requisite capacity to commit the capital murder.

C. Instructions.

1. Instruction No. 9.[3]

Fitzgerald was charged under Code § 18.2-48 with abduction of Cubbage "with the intent to defile" her. In Instruction No. 9, the trial court used the words "with the intent to sexually molest" in lieu of the statutory language of intent. Fitzgerald contends, as he did at trial, that the instruction should have followed the language of the statute. He says that the trial court broadened the definition of "defile" by giving the instruction as drafted.

[16, 17] The instruction, proffered by the Commonwealth, was based upon a model instruction. 1 Virginia Model Jury Instructions—Criminal 79 (Supp. 1, 1980). The drafters of the model instructions stated in their explanatory comment that older definitions of defilement are susceptible of several meanings but, since "the modern legal meaning seems restricted to sexual relations," the drafters used "sexually molest" as the functional equivalent of "defile." *Id.* at 80. We agree that the terms are interchangeable within the meaning of the statute.

[18] It is permissible of course to draft instructions in the language of the applicable statute, but it is not obligatory to do so if the meaning of the law is not changed by the language used. *See Ranner v. Commonwealth*, 204 Va. 640, 646, 133 S.E.2d 305, 309 (1963). A jury may not understand the meaning of "defile" as well as the more precise words "sexually molest." In this instance, we approve the instruction recommended by the drafters of the model instructions and given by the trial court.

2. Instruction No. 28.[4]

Fitzgerald says that Instruction No. 28 was confusing, misleading, incomplete, ambiguous and unsupported by any indictment or evidence. In the colloquy at the time the instruction was tendered, the Commonwealth Attorney explained that he offered the instruction because Fitzgerald could be found to be a principal in the second degree to capital murder, but as such he could be convicted of only first-degree murder, since a principal in the second degree cannot be convicted of capital murder. *See Johnson v. Commonwealth*, 220 Va. 146, 255 S.E.2d 525 (1979). As an abstract statement of the law, the instruction was not incorrect.

[19] We express no opinion as to the necessity for granting this or any other instruction defining principals in the second degree, in view of the evidence in this case. However, we can perceive only benefit, rather than prejudice, to Fitzgerald from the instruction. It injected a diluting element into the legal principles controlling the jury's consideration of the evidence relating to Fitzgerald's role in the slaying. It

3. Instruction No. 9 provided in pertinent part:

The defendant is charged with the crime of abduction with intent to defile. Kidnapping and abduction are the same crime. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:

(1) That the defendant by force or deception did seize, take, transport and detain Patricia Cubbage; and

(2) That the defendant did so with the intent to sexually molest Patricia Cubbage; and

(3) That the defendant acted without legal justification or excuse.

* * * * * * *

4. Instruction No. 28 provided:

A principal in the first degree is the person who actually commits the crime. In a capital murder case only the principal in the first degree can be convicted of capital murder. A principal in the second degree is a person who is present, aiding and abetting, by helping in some way in the commission of the crime. Presence or consent alone are not sufficient to constitute aiding and abetting. It must be shown that the defendant intended his words, gestures, signals or actions to in some way encourage, advise, or urge, or in some way help the person committing the crime to commit it.

A principal in the second degree is liable for the same punishment as the person who actually committed the crime, except that a principal in the second degree cannot be guilty of capital murder. The Commonwealth must prove beyond a reasonable doubt that the defendant is a principal in the second degree.

If you find the Commonwealth has failed to prove any one or more of the elements of the offense beyond a reasonable doubt, then you shall find the defendant not guilty.

required the jury to find, in respect to non-capital charges, that Fitzgerald was guilty even if he was found to be only a principal in the second degree, but, in respect to the capital charge, it permitted the jury to find that he was not guilty of capital murder if he was found not to be the one who struck the blows that killed Cubbage.

C. Double Jeopardy.

After Fitzgerald was convicted of capital murder and the non-capital offenses with which he was charged, he moved the trial court to vacate, on double-jeopardy grounds, the sentences imposed upon him by the jury for rape and robbery. The motion was denied.

Fitzgerald argues that his right under the Double Jeopardy Clause of the Fifth Amendment was violated when he was sentenced for the felonies underlying his conviction of capital murder. He now asks that his convictions for rape and robbery be set aside on the basis of double jeopardy, and that all his other convictions be set aside because a reasonable doubt exists whether the multiple convictions improperly influenced the jury in arriving at the death sentence. He relies on *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and, even more heavily, on *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977) (per curiam).

In *Harris*, the defendant was convicted of felony-murder, which in Oklahoma at that time consisted of murder in the course of "robbery with firearms." 433 U.S. at 682, 97 S.Ct. at 2912–13. Following this conviction, the defendant was brought to trial a second time on an indictment charging him with the underlying robbery. The Court noted that under Oklahoma law robbery with firearms was a lesser-included offense of felony-murder in the course of robbery with firearms and held that the "Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." *Id.* at 682–83, 97 S.Ct. at 2913.

[20] *Harris* is inapposite. In *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), decided the same term as *Harris*, the Court repeated that the Double Jeopardy Clause affords protection in three different instances: (1) It "'protects against a second prosecution for the same offense after acquittal. [(2)] It protects against a second prosecution for the same offense after conviction. [(3)] And it protects against multiple punishments for the same offense.'" 432 U.S. at 165, 97 S.Ct. at 2225, quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). Both *Brown* and *Harris* involved protection (2) above, the purpose of which is to guarantee "a constitutional policy of finality *for* the defendant's benefit." *Brown*, 432 U.S. at 165, 97 S.Ct. at 2225, citing *United States v. Jorn*, 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971) (plurality opinion). The present case, however, involves protection (3) in a single trial, where "the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Id.; Blythe v. Commonwealth*, 222 Va. 722, 725, 284 S.E.2d 796, 798 (1981). *See Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), where the Court found that the legislature (Congress) had provided a statute[5] evincing a legislative intent to codify "the Blockburger test."[6]

5. District of Columbia Code § 23-112 provided that sentences run consecutively for offenses arising out of the same transaction unless the trial court directs otherwise or one offense "requires proof of a fact which the other does not."

6. In determining whether Congress authorized separate punishments for multiple drug offenses arising from a single narcotics transfer, the Court in *Blockburger* stated: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not." (Citations omitted). 284 U.S. at 304, 52 S.Ct. at 182.

[21] We have used the *Blockburger* test on numerous occasions to resolve double jeopardy issues where the defendant was convicted at a single trial of multiple offenses arising out of the same transaction and the authorized legislative punishments were less than plain. *See Blythe; Jones v. Commonwealth*, 218 Va. 18, 235 S.E.2d 313 (1977); *Epps v. Commonwealth*, 216 Va. 150, 216 S.E.2d 64 (1975); and cases therein cited. However, we have found it unnecessary to apply *Blockburger* where the General Assembly has "clearly indicated its intent to impose multiple punishments." *Turner v. Commonwealth*, 221 Va. 513, 530, 273 S.E.2d 36, 47 (1980), *cert. denied*, 451 U.S. 1011, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981).

An examination of the statutes relevant to the present appeal convinces us that this case stands on the same footing as *Turner*. Code § 18.2-31, defining capital murder, was first enacted by the General Assembly in 1975 as part of a statutory scheme enacted to eliminate the "unbridled choice between the death penalty and a lesser sentence" prohibited by *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). *Smith v. Commonwealth*, 219 Va. 455, 473, 248 S.E.2d 135, 146 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979); *see also Whitley v. Commonwealth*, 223 Va. 66, 77, 286 S.E.2d 162, 168 (1982). In 1976, the General Assembly added subsections (d) and (e) to § 18.2-31. These subsections expanded the definition of capital murder to include the "willful, deliberate and premeditated killing" of any person "in the commission of, or subsequent to, rape," and "in the commission of robbery while armed with a deadly weapon." Acts 1976, c. 503.

Prior to 1975, murder of the first degree was punishable by death, or by confinement in prison from twenty years to life. Code § 18.1-22 (Repl.Vol.1960) and predecessor statutes. First-degree murder was defined as "[m]urder by poison, lying in wait, imprisonment, starving, or by any wilful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, robbery or burglary." Code § 18.1-21 (Repl.Vol.1960) and predecessor statutes. All other murder was murder of the second degree. *Id.*

The first-degree murder statute and its death sanction dated from 1796. Acts 1796, c. 2, §§ 1-2, 4. In that year the General Assembly enacted statutes to mitigate the harshness of the common law which punished murder and numerous other crimes with death. Thus, Acts 1796, c. 2, § 1, abolished the death penalty except for crimes specifically denoted by an Act of Assembly. Finding "the several offences which are included under the general denomination of murder, differ so greatly from each other in the degree of their atrociousness, that it is unjust to involve them in the same punishment," the General Assembly fixed gradations of murder, Acts 1796, c. 2, and provided the death penalty only for murder of the first degree.

Subsequent amendments to the murder statutes, including those enacted in response to *Furman* in 1975, have changed the substance and the procedure of the statutes, but not their evident purpose. That purpose is gradation. The General Assembly grades murder in order to assign punishment consistent with prevailing societal and legal views of what is appropriate and procedurally fair.

The overriding purpose of the murder statutes being gradation, we can divine no legislative intent to eliminate punishment for other offenses included in the murder statutes solely for the purpose of categorizing the murder. The legislature has granted authority for the punishment of rape, Code § 18.2-61, and robbery, Code § 18.2-58. Moreover, in Code § 19.2-308 the General Assembly has provided, "When any person is convicted of two or more offenses, and sentenced to confinement, such sentences shall not run concurrently, unless expressly ordered by the court." *Cf.* D.C. Code § 23-112, *supra*, n.5. In the face of the current statutory scheme and its legislative history, we can not say that the legislature intended any elimination of underlying sentencing authority for rape and robbery when it modified the murder statutes in 1975, or on any prior occasion.

A contrary conclusion would create disorder and anomalous results in punishments, which the General Assembly will not be presumed to have intended. For example, a person convicted of armed robbery and second-degree murder arising out of a single transaction might receive a life sentence for the robbery and twenty years in prison for the murder. His cohort convicted of capital murder or first-degree murder (felony-murder) in the commission of armed robbery might receive a life sentence for the murder but nothing for the robbery. In this instance, the less culpable criminal would receive the greater punishment as the sole result of a statutory scheme theoretically aimed at rational gradation.

[22] For the foregoing reasons, we hold that the imposition of sentences against Fitzgerald for the rape and robbery underlying his capital murder conviction did not violate the Double Jeopardy Clause.

D. Conflict of Interest.

On November 17, 1980, the General District Court entered an order appointing Fred S. Hunt, III, counsel for Fitzgerald. By order entered February 24, 1981, on motion of Fitzgerald, by Hunt, his attorney, reciting the seriousness of the charges and complexity of the case, the General District Court appointed Harold W. Burgess, Jr., as an additional attorney to represent Fitzgerald.

At a hearing on other matters held on July 9, 1981, the trial court asked Fitzgerald if he was satisfied with the services of his attorney. Fitzgerald replied that he was. The court then informed Fitzgerald that one of his attorneys, Hunt, was married to an Administrative Assistant in the office of the Commonwealth Attorney. Fitzgerald said that he had not known this before, but that he was ready for trial, and was satisfied with the services of his attorney. At the beginning of his trial on July 14, 1981, Fitzgerald again, in answer to the court's questions, said that he was satisfied with the services of Messrs. Hunt and Burgess, that all his witnesses were present, and that he thought that everything that should have been done had been done to prepare his case for trial.

After his conviction and sentencing, Fitzgerald wrote a letter to the trial court requesting new attorneys. At a hearing, Fitzgerald told the court that because of Mrs. Hunt's employment he did not believe Hunt was impartial. The court stated that Hunt had "represented him ably," but appointed new counsel to represent Fitzgerald on appeal.

In oral argument before us, Fitzgerald's counsel expressly repudiated any suggestion that there was an actual conflict of interest in Hunt's representation of Fitzgerald, that Hunt's representation had been ineffective, or that Hunt had acted otherwise than in what he believed were Fitzgerald's best interests. Counsel could only argue that Hunt's situation projected the appearance of a potential conflict of interest that in some mysterious way tainted his conduct of the defense. Relying on *Smith v. Phillips*, — U.S. —, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982), he argued that the court violated Fitzgerald's Sixth Amendment rights to counsel by not inquiring *sua sponte* to determine whether Hunt could be impartial and effective.

[23] We reject this argument. *Smith* is inapposite. It merely holds that prosecutorial misconduct requires a hearing when it involves potential juror bias. *Id.* at —, 102 S.Ct. at 945. The trial court informed Fitzgerald about Mrs. Hunt's employment, and Fitzgerald expressed his satisfaction with the services of his attorneys until some weeks after his trial had ended in his convictions and sentencing. He has never suggested any logical reason why Mrs. Hunt's employment in the Commonwealth Attorney's office could have compromised Hunt or prejudiced Fitzgerald. It would be more logical to believe that Hunt might obtain from his wife information that would be of assistance to him in defending Fitzgerald. As an attorney in private practice, Hunt had a reputation to establish or enhance by vigorously defending any indigent whom he was appointed to represent. Anything less

than a dedicated, thorough, and aggressive effort to the best of his ability would be detrimental to his law practice. Moreover, Fitzgerald had no complaint against Burgess, who also represented Fitzgerald and took an active part in the trial. On the face of the record, there is no evidence of a potential conflict of interest on the part of Hunt requiring any inquiry by the trial court. To the contrary, the record shows that Hunt conducted himself throughout the trial with undeviating loyalty to his client.

III. The Sentencing Trial.

A. Constitutionality of the Capital Murder Statute.

[24] Fitzgerald challenges the facial constitutionality of the capital-murder statute under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article One, Section Two of the Constitution of Virginia. He acknowledges that we have rejected such arguments in previous cases, beginning with *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135, *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979), and continuing through *Evans v. Commonwealth*, 222 Va. 766, 284 S.E.2d 816 (1981). *See also Claxton v. Commonwealth*, 223 Va. 41, 288 S.E.2d 172 (1982). We reaffirm the views that we expressed in those cases.

IV. Appellate Review.[1]

A. Whether the Sentence of Death Was Arbitrarily Imposed.

[25] Fitzgerald argues that the cumulative effect of the errors assigned, which we have heretofore discussed, may have unduly influenced the jury, and that further undue influence may have resulted from the multiple convictions. In *Waye v. Commonwealth*, 219 Va. 683, 704, 251 S.E.2d 202, 214, *cert. denied*, 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292 (1979), we rejected the substance of this argument that the sum of numerous alleged errors that we have found to be meritless constituted reversible error; we reject the argument here.

B. Whether the Sentence of Death was Excessive or Disproportionate.

Although he assigned it as error, Fitzgerald did not argue on brief or before us that the sentence of death imposed upon him was excessive or disproportionate. Nevertheless, under the mandate of Code § 17-110.1(C) it is our duty to consider and determine this question.

Under Code §§ 19.2-264.2 and 19.2-264.4(C), a jury may impose the death sentence upon either of the alternative findings therein provided, *i.e.*, the probability, based on his record, that the defendant will be a continuing threat to society, or the vileness of the capital murder itself. In the present case, the jury based its verdict upon the finding that Fitzgerald's conduct in committing the capital murder of Cubbage was "outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim."

We have examined the records in all the capital murder cases reviewed by this Court. We have upheld the imposition of the death sentence in *Waye v. Commonwealth*, 219 Va. 683, 251 S.E.2d 202, 207, *cert. denied*, 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292 (1979) (rape), *Justus v. Commonwealth*, 222 Va. 667, 283 S.E.2d 906 (1981) (rape), *Coppola*, 220 Va. 243, 257 S.E.2d 797 (1979), *cert. denied*, 444 U.S. 1103, 100 S.Ct. 1069, 62 L.Ed.2d 788 (1980) (robbery), and *Whitley*, 223 Va. 66, 286 S.E.2d 162 (1982) (robbery), where the sentences were based solely upon findings of vileness in the commission of the crimes. In *Waye*, the defendant had bitten and

1. Code § 17-110.1(C) requires that in addition to considering errors assigned to the conduct of the trial we consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and

2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

repeatedly stabbed his victim. In *Justus*, the defendant had shot his victim, who was eight and a half months pregnant, twice in the face and once in the back of the head. In *Coppola*, the defendant repeatedly beat the head of his victim against the floor, breaking her teeth, choking her, and eventually killing her. In *Whitley*, the defendant manually strangled his victim, strangled her with a rope, and cut her throat.

[26] The vileness of Fitzgerald's capital murder of Cubbage exceeded that of any of the cases which we have reviewed. The systematic torturing of his victim by slashing her with a machete and a knife, followed by comprehensive mutilation, reflected relentless, severe, and protracted physical abuse inflicted with brutality and ferocity of unparalled atrociousness. We hold that the sentence of death is not excessive or disproportionate to sentences generally imposed by Virginia juries in crimes of a similar but less horrifying nature.

We have found no reversible error in the rulings of the trial court, and we have independently determined that the sentence of death was properly imposed. Therefore, we decline to disturb or commute the sentence, and we will affirm the judgment of the trial court.

Affirmed.

IN THE SUPREME COURT
OF VIRGINIA

EDWARD BENTON FITZGERALD,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

Record No.
811669
ASSIGNMENTS
OF ERROR

Appellant, Edward Benton Fitzgerald, by counsel, assigns the following as errors:

1. The sentence of death was imposed under the influence of passion, prejudice, undue influence, and other arbitrary factors.

2. The sentence of death is excessive and disproportionate to the penalty imposed in similar cases.

3. Imposition of the death penalty by means of electrocution is unnecessarily cruel and is forbidden by the Eighth and Fourteenth Amendments to the Constitution of the United States.

4. The trail court erred in admitting into evidence the shoes of the defendant over his objection in violation of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

5. The trail court erred in refusing Defendant's Motion to strike for cause veniremen Horace Elwin Hackney and Hampden S. Mann, Jr. in violation of the Sixth and Fourteenth Amendments to the United States Consitution in that both prospective jurors were not impartial triers of fact.

6. The trial court erred in denying defendant the right to cross-examine Commonwealth's key witness, Co-defendant Daniel

Johnson about the facts surrounding his prior conviction after the Commonwealth had questioned him on that matter.

7. The trail court erred in admitting into evidence over defendant's objection during the guilt stage of the trial certain black and white photographs of the victim's body as well as the unfettered very graphic prejudicial testimony of the medical examiner as to the condition of the victim's body and cause of death in violation of the Sixth Amendment right to a fair trial.

8. The trail court erred in failing to declare a mistrial following the highly imflammatory and prejudicial testimony of Dr. William Massello, State Medical Examiner, during the guilt stage of the trial.

9. The trial court erred in admitting into evidence over defendant's objection during the guilt stage of the trial certain color photographs of the initial crime scene in violation of the Sixth Amendment right to a fair trial.

10. The trial court erred in admitting into evidence over defendant's objection all items of physical evidence present at the preliminary hearing in that the chain of custody for those items was broken when they were left unattended by a police officer in the Courtroom during the preliminary hearing on March 20, 1981 in the General District Court of Chesterfield County.

11. The trial court erred in admitting into evidence over the objection of the defendant certain items of physical evidence sent from the State Central Laboratory in Richmond to the Northern Laboratory in Merrifield, Virginia for analysis without proper foundation demonstrating the integrity of the claim of custody.

12. The trial court erred in denying the defendant's motion to strike the Commonwealth's evidence and denfendant's motion to set aside the verdicts for the following reasons:

(a) the intoxication of the defendant was such as to negate the specific intent necessary to prove capital or first degree murder.

(b) improperly admitted evidence.

(c) refusal of granting of defendant's instruction on abduction and the granting of Commonwealth's instruction on the same crime.

(d) proof was insufficient beyond a reasonable doubt to establish both that Rape and Robbery occurred and that the killing occurred during the commission of robbery or during the commission of or subsequent to rape and therefore the capital murder conviction, dependant on proof of either Rape or Robbery should have been set aside.

(e) there was insufficient proof to show that the defendant intended to defile the victim.

(f) the Commonwealth's evidence came largely from the Co-defendant whose testimony was beyond reasonable belief.

13. The trial court erred in denying defendant's motion to poll the jury following their finding of guilt on the capital murder endictment as to whether or not any panel member had reached a determination of the punishment to be inflicted upon the defendant prior to the second stage of the bi furcated proceeding.

14. The imposition of the death penalty upon a finding that the defendant's conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture,

depravity of mind and aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder is an abridgement of the defendant's Constitutional Rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, in that there in no rational relationship between the capital murder conviction and the death penalty because without a finding of the underlying felony required by the capital muder statute, no matter how wantonly vile, horrible or inhuman the defendant's conduct may be, neither a capital murder conviction nor the death penalty could be imposed.

15. The trial court erred in denying the defendant's motion to set aside the punishment imposed by the jury on both the rape and robbery convictions when the defendant had been convicted and sentenc for capital murder which conviction was dependant on a finding beyond a reasonable doubt of guilt on either or both rape and robbery, all of which is in violation of the double jeopardy clause of the Fifth and Fourteenth Amendments to the Constitution of the United States.

16. In the absence of evidence beyond a reasonable doubt that the defendant committed either rape or armed robbery, a conviction for capital murder as a murder committed during the commission of either underlying felony violates the defendant's right to due proces of law and his right to be free from cruel and unusual punishment arbitrarily and capriously imposed which rights are guaranteed by the Eighth and Fourteenth Amendments to the Constitution.

17. The trial court erred in admitting into evidence at the second stage of the trial over objection by the defendant, color photographs of certain areas of the body of the victim which were highly inflammatory and tended to exaggerate and distort the wounds inflicted.

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18. The trial court committed error at the defendant's sentencing hearing in that its comments indicate that it had made a prior determination to affirm the death sentence imposed by the jury without consideration of evidence in mitigation presented by the defendant at this hearing.

EDWARD BENTON FITZGERALD

By _____
Counsel

Fred S. Hunt, III
Beddow, Marley, Burgess and Murphey
P. O. Box 145
Chesterfield, Virginia 23832

Harold W. Burgess, Jr.
Beddow, Marley, Burgess and Murphey
P. O. Box 145
Chesterfield, Virginia 23832

CERTIFICATE

I hereby certify that on this 16th day of October, 1981, I mailed a copy of the foregoing Assignments of Error to Robert H. Anderson, III, Assistant Attorney General of Virginia, 900 Fidelity Building, 830 East Main Street, Richmond, Virginia 23219.

_____

to me and I will then further advise you. You may now retire.

NOTE: The jury retire to consider their verdict at 9:15 o'clock a.m. and return at 9:30 o'clock a.m.

THE COURT: Ladies and gentlemen, have you reached a verdict?

JURY FOREMAN: Yes, sir.

THE COURT: Give it to the Sheriff.

NOTE: The verdict is handed to the Court.

THE COURT: We, the jury, on the issue joined, having found the defendant guilty of the willful, deliberate and premeditated murder of Patricia Cubbage in the commission of -- You didn't strike out the and/or in your verdict. Do you understand? Did you make both findings?

JURY FOREMAN: I would strike out the and. It would be or.

THE COURT: What I want to do is to get you to go back and reconsider your verdict, because the way the instruction is written, you have a choice of whether you found one way or the

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other way or both. You will all have to decide. I am going to allow you to return and reconsider your verdict again.

All right. Take the jury back, please. This is for the whole jury to consider.

NOTE: The jury retire at 9:35 o'clock a.m. to further consider its verdict, and return at 9:42 o'clock a.m.

THE COURT: Pass the verdict up, please.

NOTE: The verdict is handed to the Court.

THE COURT: All right. The way the verdict is written you have stricken and.

JURY FOREMAN: Yes, sir.

THE COURT: It's necessary for you to make a determination as to whether or not, one, you found it a threat to society or whether you found that the crime was committed in a wantonly vile way; and the way the verdict is written, you have found both. The way you have it.

While armed with a deadly weapon and in the commission of, or, after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society,

or his conduct in committing the offense is outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind and aggravated battery on the victim beyond the minimum necessary to accomplish the act of murder, and having considered the evidence in mitigation of the offense --

As I instructed you, before you can impose the death penalty, it is necessary for you to make one or two findings. You don't have to find both; one or the other, or you can find both. The way the verdict is written with the or in it, you don't say which one. You would have to strike out the paragraph that was involved. So what I am saying to you, you have to make an election as to which one you did find that he did. Do you understand what I am talking about?

JURY FOREMAN: We understand. We misinterpreted your instruction, Your Honor.

THE COURT: All right. Fine. Would you like to go back to reconsider your verdict?

JURY FOREMAN: Under these conditions; yes.

THE COURT: Do you understand? Does each member of the jury understand what is involved? You must make a finding of which area he was

involved in before you can impose the death penalty.

All right. Go back to the jury room. If you need any assistance, I will give you further advice.

NOTE: The jury again retire at 9:45 o'clock a.m.

MR. HUNT: Judge, again I would ask, in addition to the court polling the jury as to their individual verdicts, at that time that the court also inquire as to whether any individual juror discussed this matter with another juror at the conclusion of last night's deliberation and prior to returning this morning to deliberate.

THE COURT: I don't know whether that is a proper question. The last part of your request. Do you have any comment about that?

MR. WATSON: Judge, the Commonwealth doesn't think it's proper, either. I don't know that it is not allowed once they begin deliberation. Well, they may have been asked to deliberate as a body, not as individuals.

THE COURT: I don't know whether it is really necessary. I haven't really considered that

point before myself.

It may be helpful if we can get three forms of verdict prepared so they will have the proper form. They can make a finding of both, one, or the other. Example verdict forms would be the best solution.

MR. HUNT: The form used was the statutory form, Your Honor.

THE COURT: That's right. But it must be applicable to the evidence.

The finding must be made by the jury, too. It must be a finding made by the jury. The form of the verdict is determined from what they do find, what the decision is.

NOTE: The jury return at 9:55 o'clock a.m.

THE COURT: The jury verdict is: We, the jury, on the issue joined, having found the defendant guilty of the willful, deliberate and premeditated murder of Patricia Cubbage in the commission of robbery while armed with a deadly weapon and in the commission of, or subsequent to, raped and having found that, his conduct in committing the offense is outrageously or wantonly

vile, horrible or inhuman in that it involved torture, depravity or mind and aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death. Signed Stephen Lancashire, foreman.

Ladies and gentlemen, is this your verdict?

NOTE: The jurors reply in the affirmati

THE COURT: I wish to poll the jury.

Ann Love, is this your verdict?

ANN LOVE: Yes, sir.

THE COURT: Jeanette Stone, is this your verdict?

JEANETTE STONE: Yes, sir.

THE COURT: Herbert Irvin Dowdy, is this your verdict?

MR. DOWDY: Yes, sir.

THE COURT: Paul E. Campbell, is this your verdict?

PAUL E. CAMPBELL: Yes, Your Honor.

THE COURT: Stephen Lancashire, is this your verdict?

STEPHEN LANCASHIRE: Yes, sir.

Instruction No. 41

We, the Jury, on the issue joined, having found the defendant guilty of the willful, deliberate and premeditated murder of Patricia Cubbage in the commission of robbery while armed with a deadly weapon and in the commission of, or subsequent to, rape and having found that,

~~after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society,~~

~~and~~/or

his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture), (depravity of mind) (and) (aggravated battery to the victim) beyond the minimum necessary to accomplish the act of murder and having considered the evidence in mitigation of the offense; unanimously fix his punishment at death.

FOREMAN

or

We, the Jury, on the issue joined, having found the defendant guilty of the willful, deliberate and premeditated murder of Patricia Cubbage in the commission of robbery while armed with a deadly weapon and in the commission of, or subsequent to, rape and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

FOREMAN

182.

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your case can either find you guilty and sentence you? If you are found guilty, it can sentence you to death or life imprisonment?

THE DEFENDANT: Yes, sir.

THE COURT: Do you fully understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that also you are entitled to a jury trial of all these issues?

THE DEFENDANT: Yes, sir.

THE COURT: You are entitled to a separate trial on each of these issues, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Are you satisfied with the services of your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Are you aware that you have a court appointed attorney?

THE DEFENDANT: Yes, sir.

THE COURT: One specific thing I want to make sure you are aware of, I want you to understand. Do you understand that one of your court appointed attorneys' wife works for the Commonwealth Attorney's Office as Administrator?

THE DEFENDANT: No, sir.

THE COURT: Mr. Hunt's wife is Administrative

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Assistant to the Commonwealth Attorney's Office. Is this the first time you have ever known that?

THE DEFENDANT: Yes, sir.

THE COURT: I want to make sure you understand before the case is started. Are you ready to go to trial as scheduled?

THE DEFENDANT: Yes, sir.

THE COURT: You have all the available witnesses that you think you should have?

THE DEFENDANT: I hope so.

THE COURT: Are you satisfied with the services of your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: We will go forward, and I want to make sure that you understand that if you plead not guilty, you are entitled to a jury trial and a separate trial on each case.

THE DEFENDANT: Yes, sir.

THE COURT: Also, if you plead guilty, you must do so freely and voluntarily. If you do plead guilty, then you are not entitled to a trial by jury. The Court fixes your punishment without the aid of a jury. If you do plead guilty, you must do so freely and voluntarily without any coercion, threats, or intimidation by anybody. If you do plead guilty, then

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

COMMONWEALTH

vs.

EDWARD BENTON FITZGERALD

Motion for Removal of Court-Appointed Counsel

Comes now the defendant, Edward Benton Fitzgerald, in person and his court-appointed counsel, Fred S. Hunt, III and Harold W. Burgess, Jr. upon the motion of the defendant, that his court-appointed counsel be removed from his case now on appeal to the Virginia Supreme Court because the defendant is dissatisfied with the representation afforded him by this counsel, as is shown by the attached copy of correspondence from defendant to his counsel.

Edward Benton Fitzgerald Sr.

Edward Benton Fitzgerald

Fred S. Hunt, III
Harold W. Burgess, Jr.
Beddow, Marley, Burgess & Murphey
Post Office Box 145
Chesterfield, Virginia 23832

Mr. E. P. Fitzgerald Sr.
125564
Box 500
Boydton Va. 23917

JUDGE GATES
Box 7
Chesterfield Va. 23832

JUDGE GATES:

I was convicted and sentenced to DEATH by you in September 1981.

I write this letter at this time asking that the court - appointed lawyers , Hunt & Burgess , be removed from my case and be replaced with lawyers that would defend my intrest.

I am completely unsatisfied with the defence these lawyers gave me during trial and refuse to meet with them or appear in any court of law with them as my counsel.

Sincerely;
Edward B. Fitzgerald
EDWARD B. FITZGERALD SR.

Subscribed and Sworn to me
this 8 day of Dec. 1981
notary public Robert E Rogers
my commision expires June 9, 1985

E.B. Fitzgerald Sr.
125564
Box 500
Boydton Va. 23917

Harold W. Burgess Jr.
Attorney at Law
Box 745
Chesterfeild Va. 23832

Dear Sir:

I respectfuly ask that you be removed from my case.

And I ask that you notify Judge Gates and / or any party interested.

As of DECEMBER ONE NINTEEN HUNDRED EIGHTY ONE I will refuse to meet with you or appear in a court of law with you as my lawyer.

I am also notifing Judge Gates and the Att. Generals office.

Sincerely,
Edward B. Fitzgerald
EDWARD B. FITZGERALD SR.

Subscribed and Sworne to before
me this 2 day of Dec. 1981
notary public Robert E Rogers
my commison expires June 9, 1982

Application

for

EXTENSION OF TIME TO FILE
PETITION FOR CERTIORARI

(CAPITAL CASE)

O. T. 19 82

A-404

DISPOSITION: DATE:

DATE	MEMORANDUM
10/29/82	Filed
11/1/82	Granted until December 8, 1982 by Burger, CJ.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

November 2, 1982

Bradley S. Stetler, Esq.
Graber, Stetler & Townsend
Suite 202
419 Seventh Street, N. W.
Washington, DC 20004

RE: Edward B. Fitzgerald v. Virginia
A-404

Dear Mr. Stetler:

Your application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on November 1, 1982, signed an order extending your time to and including December 8, 1982.

A copy of the Chief Justice's order is enclosed.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By

Katherine A. Downs
Assistant Clerk

rjb
encl.
cc(letter only): Peter J. Murtha, Esq.
Robert Anderson, Esq.
Allen L. Lucy, Esq., Clerk, Supreme Court of Virginia (Your No. 811669)

( )

OFFICE OF THE CLERK

OCTOBER TERM, 19 82

APPLICATION No. 404

Edward B. Fitzgerald

v. CAPITAL CASE

Virginia

TO: The Chief Justice

Application for extension of time within which to file a petition for writ of certiorari to Supreme Court of Virginia

Time expires: November 8, 1982

Extension Requested: 30 days - until December 8, 1982

Reason: Counsel just agreed to represent petitioner after the decision of the Va. Supreme Court. He received the record 5 weeks ago and has not had sufficient time to review it because of other professional commitments.

October 29, 1982 Katherine Downs

Supreme Court of the United States

No. A-404

EDWARD B. FITZGERALD

Petitioner,

v.

VIRGINIA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 8, 1982.

Chief Justice of the United States.

Dated this 1st day of November, 1982

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM: 1981

No. _____ A-404

EDWARD B. FITZGERALD, :
Petitioner, :
:
v. :
:
COMMONWEALTH OF VIRGINIA, :
Respondent. :

APPLICATION FOR EXTENSION OF TIME
IN WHICH TO FILE PETITION
FOR WRIT OF CERTIORARI

To the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States and Circuit Justice for the Fourth Circuit.

Petitioner Edward B. Fitzgerald respectfully requests that an Order be entered, pursuant to Rule 20.6 of the Rules of the Court, extending the time for filing a petition for writ of certiorari in the Supreme Court of the United States in the above-styled action by thirty (30) days to and including December 9, 1982. In conformity with Rule 29.2 of the Rules of the Court, this application is being filed more than ten (10) days prior to the date upon which the petition is now due.

1. The dates pertinent to this application are as follows:

A. On June 18, 1982, the Supreme Court of Virginia issued an opinion affirming petitioner's convictions for murder, armed robbery, rape, abduction and common law burglary. Fitzgerald v. Commonwealth, (opinion appended as exhibit "A").

Petitioner's motion for rehearing was denied on September 9, 1982.

B. On November 9, 1982, the time for filing a petition for writ of certiorari will expire, unless extended.

2. Jurisdiction of this court is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and intending to here assert deprivation of rights secured by the Constitution of the United States.

3. Briefly, this case may be stated as follows. After a jury trial in the Circuit Court of Chesterfield County petitioner was found guilty of murder and other offenses and sentenced to death.

4. Petitioner appealed to the Supreme Court of Virginia claiming that his convictions and sentence were illegal and unconstitutional on numerous grounds. Petitioner claims in this court that the the Supreme Court of Virginia in his case misconstrued this court's teaching in Godfrey v. Georgia, 446 U.S. 420 (1980), inter alia, that consideration of the death penalty be guided by clear and objective standards.

5. Petitioner also believes that his right to an impartial jury was violated by the trial court's refusal to strike for cause several jurors who expressed an intention to impose the penalty of death regardless of the facts adduced in mitigation of the offense. Further, petitioner contends that he was denied the effective assistance of counsel as his court-appointed counsel in this capital case had an inherent conflict of interest, to wit: his wife, before and during trial, was employed in the office of petitioner's prosecutor.

6. By opinion dated June 18, 1982, the Supreme Court of Virginia rejected the above contentions as well as others.

7. Current counsel verbally agreed to represent petitioner only after his appeal to the Supreme Court of Virginia

had been denied. Counsel has been in possession of the record but five weeks at this writing. Due to substantial committments to local District of Columbia and Virginia practice and other primary employment, counsel has as yet been unable to provide the attention necessary for proper presentation of this case.

8. Counsel is certain that the requested thirty (30) day extension to December 9, 1982, will provide sufficient time to prepare the petition.

WHEREFORE, petitioner respectfully requests that the the time for filing his petition for writ of certiorari be extended to and including December 9, 1982.

Respectfully submitted,

EDWARD B. FITZGERALD,
By Counsel

Peter J. Murtha

PETER J. MURTHA
233 Tenth Street, N.E.
Washington, D.C. 20002
(202) 382-2521

Bradley S. Stetler

BRADLEY S. STETLER
GRABER, STETLER & TOWNSEND
Suite 202
419 Seventh Street, N.W.
Washington, D.C. 20004
(202) 638-4798

Dated: October 28, 1982

Certificate of Service

I, Bradley S. Stetler, hereby certify that one true and accurate copy of the foregoing Application For Extension of Time In Which To File Petition For Writ of Certiorari was mailed, postage pre-paid to Robert Anderson, Office of the Attorney General, Supreme Court Building, Richmond, Virginia, 23219, this 29th day of October, 1982.

Bradley S. Stetler

BRADLEY S. STETLER

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-5853

EDWARD B. FITZGERALD,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

GERALD L. BALILES
Attorney General of Virginia

ROBERT H. ANDERSON, III
Assistant Attorney General
101 North Eighth Street
Richmond, Virginia 23219

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SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-5853

EDWARD B. FITZGERALD,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of Virginia is recorded at 223 Va. 615, 292 S.E.2d 798 (1982).

JURISDICTION

The Petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. Whether The Trial Court Properly Instructed The Jury Regarding The Aggravating Factor(s) That It Was Required To Find In Order To Sentence Petitioner To Death?

II. Whether The Evidence Was Sufficient To Establish That Petitioner Had Raped The Decedent Prior To Or During The Commission Of The Capital Murder?

III. Whether The Trial Court Adequately Discharged Its Duties Regarding The Fact That One Of Petitioner's Two Trial Attorneys Had A Wife Who Was Employed In The Prosecutor's Office During The Trial?

STATEMENT OF THE CASE

On November 13, 1980, Patricia Cubbage, Donald Henn, Angelia Robinson, Daniel Johnson, and Petitioner drank beer and smoked marijuana at Petitioner's house. Later that evening, Petitioner and Johnson went to Sandston to see a friend who was apparently having trouble with a would-be intruder. They took with them a machete after Petitioner stated that he anticipated difficulties in Sandston. (App. 64-65.)

When they arrived there, they observed no intruder. Subsequently, they entered the apartment of the tenants, David and Lenore Bradley. After visiting with them for several hours, the two men drove back in Johnson's automobile to Richmond. Petitioner started to complain about how Patricia Cubbage had "ripped him off." (App. 170.) He then suggested to Johnson that they go to Henn's home where they could break in and steal drugs. Cubbage was temporarily living with Henn and his wife, who was away on a business

trip. Henn and Robinson had left Cubbage alone at the house to go to Richmond. (App. 171.)

Fitzgerald and Johnson then parked their vehicle near the home and broke in through a back window. Johnson, who remained downstairs while Petitioner went upstairs then heard Cubbage ask Petitioner why he was there. After hearing what sounded like a small scream, Johnson went upstairs, and saw Cubbage sitting on the floor nude and with a cut over her left eye. (App. 174-75.) After they put her on the bed, Petitioner said: "I have always heard that you were a good fuck and a good piece of ass and I'm going to find out." (App. 176-77.) As Fitzgerald began to remove his pants, Johnson turned his head away. He heard Cubbage say that she was on her period and had a tampon within her. Johnson then looked around and saw the tampon lying on the side of the bed; he believed that Petitioner had pulled it out of her. (App. 177.) When Johnson again turned his head away, he heard Cubbage "breathing hard...heard the bed squeaking." (App. 178.) Petitioner then pulled up his pants and said to Cubbage: "You're not worth a fuck. You're nothing but a no good for nothing slut." (App. 178.)

Petitioner then hit Cubbage several times with the machete. He forced Johnson to accompany her to the automobile so that he could take her to see someone that she "had always fucked over." (App. 179.) As Johnson helped her go

outside, Petitioner went back into her bedroom and picked up her purse. (App. 181.)

Petitioner then directed Johnson to a nearby wooded area. Petitioner, who had removed Cubbage's clothes during the ride, then forced her to attempt to orally sodomize him; she had to stop, however, because of the amount of blood in her mouth. (App. 185.) After he hit her with the machete and knocked her to her knees, she looked up "at the sky and she said: God, please just blow my brains out and get it over with--like this." (App. 186.)

Petitioner then stabbed her numerous times over her entire body with the machete and also a knife that he carried in his wallet. During this carnage, he placed the machete in her vagina and then in her rectum and moved it up and down as if to simulate sexual intercourse. (App. 187-88.) A subsequent medical examination revealed that decedent had been stabbed or cut at least 184 times. (App. 365-66.) The cause of death was her loss of blood; in fact, virtually no blood remained in the vessels of the body. (App. 375-76.) The medical examiner further opined that all of the wounds had occurred before Cubbage's death. (App. 376.)

Fitzgerald and Johnson then went to a dumping area of a nearby apartment complex. After Petitioner rummaged through decedent's purse, he threw it out and they then drove to Petitioner's home. There, they put their bloodied clothes in the washing machine. Petitioner placed an intricate tattoo

on Johnson's left arm after telling him that he was a "one percenter" which meant that he was "a total outlaw and had no respect for the law whatsoever and didn't care for anyone but himself." (App. 195-96.)

A Chesterfield County police officer who was on his way to Henn's residence to investigate the apparent crimes that had been reported by Henn and Robinson upon their return to his home saw and recognized Johnson's automobile as it was leaving the wooded area. (App. 265-7.) Upon being advised by Henn and Robinson that Petitioner and Johnson had been with Cubbage earlier in the evening and also that Cubbage's pocketbook was missing, he decided to go to the dumping ground area. There, he found decedent's purse about 50 yards from where he had seen the car. Later, in the wooded area, certain personal effects of Cubbage were found. (App. 307-14.) Further investigation revealed that Johnson had been out all night with Petitioner. Further, a bloodied floor mat and Sunday newspaper were found in his car. (App. 300-02.)

Subsequently, Chesterfield County investigators went to Petitioner's home in the early afternoon on November 14. Pursuant to a consensual search from Fitzgerald's wife, they recovered the tennis shoes and clothes that had been left behind by Johnson. (App. 349-50.) During this interview, Petitioner returned to the apartment. After consenting to an interview by the police, he was speaking with them when one

officer noticed what appeared to be dried blood and vegetation on Fitzgerald's shoes. He therefore took the shoes from Petitioner as well as his tattoo kit. (App. 351-53). Later, during another search consented to by Mrs. Fitzgerald, he found Petitioner's knife hidden far underneath the kitchen cabinet. (App. 340-43.) Subsequently, after the discovery of decedent's body, Petitioner was arrested and charged with the various offenses.

During his incarceration at the Chesterfield County Jail, he had several conversations with Wilbur Caviness, who was then a trustee. When Caviness asked Petitioner why he had killed Cubbage and cut her up, Fitzgerald responded that "he had screwed her and the pussy was so good to him he cut it out and carried it home to have it to eat." Petitioner further indicated that Cubbage "snitched on him and snitched on a friend of his also." (App. 240.) In this regard, there was evidence that Cubbage had been an informer or "snitch" for the Richmond Police Department. (App. 243.)

After a jury trial, Petitioner was convicted of capital murder, armed robbery, rape, abduction, and breaking and entering. He was given life terms in the penitentiary on all of the non-capital charges. Thereafter, the penalty stage of the trial was conducted. The jury then recommended a sentence of death based on a finding that Petitioner's conduct" in committing the offense [was] outrageously or wantonly vile, horrible or inhuman in that it involved

torture, depravity of mind and aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder...." (App. 534-35.) See 19.2-264.2 of the Code of Virginia (1950), as amended. On September 4, 1981, the trial court imposed the death sentence on the capital murder conviction and life sentences on the other charges.

Petitioner then appealed his convictions to the Supreme Court of Virginia which accorded his case a priority status. On June 18, 1982, the Supreme Court of Virginia affirmed Petitioner's convictions. (Record No. 811669.)

ARGUMENT AGAINST GRANTING CERTIORARI

I.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ABOUT THE AGGRAVATING FACTORS THAT IT MUST FIND IN ORDER TO SENTENCE PETITIONER TO DEATH.

Petitioner first argues that after the jury had indicated in a question to the trial judge that it had not unanimously found the existence of either of the two aggravating factors in § 19.2-264.2 of the Code of Virginia, the Court failed to take actions sufficient to insure that such unanimity would be present prior to the death sentence being imposed. It is argued that in effect the trial judge directed a verdict of death.

Respondent says that this argument has never been raised on the State level and thus should not be considered by this Court. It is well established that an issue raised for the first time in a petition for a writ of certiorari should not

reviewed by this Court. This principle was illustrated in Cardinale v. Louisiana, 394 U.S. 437 (1969). There, it developed during oral argument before this Court that the one federal question had not been raised, preserved, or passed upon in the State courts below. The Court then dismissed the writ of certiorari for lack of jurisdiction and stated:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions....The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions....
>
> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important the state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground."

394 U.S. at 438-39.

It is true that on direct appeal to the Supreme Court of Virginia, petitioner assigned as error that his death sentence was imposed under the influence of passion, prejudice, undue influence, and other arbitrary factors. Further, under § 17-110.1(C)(1), the Supreme Court is required in any capital case to determine whether the death penalty was imposed under the influence of such improper factors. On appeal, petitioner referred to a number of other assigned errors and asserted that these errors had influenced the jury's verdict. Brief of Appellant at 34-35. Nothing remotely comparable to the present argument, however, was advanced on the state

level. In its written opinion, the Supreme Court of Virginia clearly limited its consideration of this error to the contention raised by petitioner on brief. Fitzgerald v. Commonwealth, 223 Va. at 639. It is therefore manifest that the present claim was not considered on the state level. Surely, the fact that the Supreme Court considered the overall contention that arbitrary factors had brought about the death penalty should not be deemed to mean that any and all arguments subsumed within this overall contention are implicitly raised and rejected. If that were the case, then, for example, a hearsay claim that had never previously been propounded could be raised in a petition for a writ of certiorari to this Court on the theory that it had been "implicitly" rejected by the state court. Obviously, such a contention is without merit.

In any event, any claim that the trial court somehow directed the verdict in this case is groundless. During the penalty stage of petitioner's trial, the jury was instructed that in order to sentence him to death it must find beyond a reasonable doubt the existence of at least one of the two statutory aggravating factors. (App. 20.) In the event that it did so find, it could still fix the punishment at life imprisonment. If neither circumstance was established beyond a reasonable doubt, then the jury was required to impose a term of life imprisonment. Then, when the jury returned with a verdict, the trial court made them go back to their room in

order to return a legally sufficient verdict. He clarified the fact that the verdict form should demonstrate whether the jury "found one way or the other way or both. You all will have to decide." (Tr. 940-41.) The jury then returned the second time with a verdict. Again, the trial judge clarified the instruction for the members of the jury. He again informed the jury that it could "find both; one or the other, or you can find both. The way the verdict is written with the or in it, you don't say which one." (Tr. 942.) The jury then returned with a verdict which had crossed out the "future dangerousness" factor and the "and" from the "and/or" portion of the finding instruction. The jury stated that it had found the existence of the "vile" circumstance and thus "unanimously" fixed his punishment at death. Any question regarding the unanimity of the jury about the finding of this factor was eliminated by the polling of the members of the jury. (Tr. 945-46.) Respondent submits that the record therefore demonstrates that no directed verdict occurred in this case, but rather that the jury unanimously found that petitioner's actions were sufficiently "vile" to mandate the imposition of the death penalty.

II.

THE EVIDENCE ADEQUATELY SHOWED THAT PETITIONER RAPED DECEDENT PRIOR TO OR DURING THE COMMISSION OF THE CAPITAL MURDER.

In the present petition, Fitzgerald contends that the evidence was insufficient under Jackson v. Virginia, 443 U.S.

307 (1979), to prove beyond a reasonable doubt that he had raped Patricia Cubbage. The rape and his robbery of her pocketbook were the two underlying felonies rendering the subsequent homicide capital murder under § 18.2-31 of the Code of Virginia. Respondent submits that the evidence was ample to satisfy Jackson, which requires that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Petitioner claims that the evidence did not adequately establish his penetration of Cubbage. Johnson testified, however, that in the bedroom at the Henn residence, petitioner told Cubbage that he had "always heard that you were a good fuck and a good piece of ass and I'm going to find out." (App. 176-77.) Johnson then saw Fitzgerald begin to remove his pants. Cubbage stated that she was on her period and had a tampon within. Johnson then turned back and saw the tampon on the bed; Johnson believed that petitioner had removed it from her. (App. 177.) Then, as he turned his head away he heard Cubbage breathing hard and the bed squeaking. He then saw petitioner pull up his pants and tell Cubbage that she was "not worth a fuck." (App. 178.) In addition, the Commonwealth introduced evidence that head hairs "consistent" with the head hairs of Cubbage and a pubic hair "consistent" with the pubic hairs of Fitzgerald had been found on the bed sheet in the decedent's bedroom. (App. 389-92.) When all of the above evidence is considered in conjunction with peti-

tioner's statement to Caviness as to why he had mutiliated Cubbage, it is clear that a rational trier of fact could have concluded that petitioner had in fact penetrated Cubbage.

It is incorrect, as the above evidence demonstrates, to assert that only the testimony of Caviness constituted proof of the rape. It is grotesque to argue that petitioner's explanation for his deeds, as testified to by Caviness, simply showed that he was a misguided humorist or person offended by the question. The absurdity of this contention is shown by the fact that at page 17 of his petition, petitioner complains that Caviness' testimony supplied to the jury "the malignant nature" of petitioner and thereby demonstrated "that he was a man not fit to live."

As part of his attack on the sufficiency of the evidence, petitioner argues that the Commonwealth improperly used Caviness as a surprise witness. Petitioner argues that under the facts of this case, particularly given the fact that this was a capital murder prosecution, this use of Caviness prejudiced his right to due process and to a fair trial. Clearly, however, the improper use of a surprise witness has nothing whatever to do with the sufficiency of the evidence. At no point on appeal did petitioner complain that his constitutional rights had been violated by this testimony. Accordingly, this claim should not be considered by this Court at the present time. See Cardinale v. Louisiana, supra.

Respondent further submits that the present claim is not the sort of issue that should justify the granting of a writ of certiorari. This Court has already held that a petition should not be granted to review evidence and discuss specific facts. See, e.g., United States v. Johnston, 268 U.S. 220 (1925).

III.

THE TRIAL COURT ADEQUATELY DISCHARGED ITS RESPONSIBILITIES CONCERNING THE FACT THAT ONE OF PETITIONER'S TWO TRIAL ATTORNEYS WAS MARRIED TO AN EMPLOYEE IN THE PROSECUTOR'S OFFICE.

Petitioner argues that the trial judge did not adequately discharge his duties when it became known that one of Fitzgerald's two trial attorneys was married to an administrative assistant in the Commonwealth's Attorney's office in Chesterfield County. On July 9, 1981, the trial judge sua sponte advised petitioner of this fact. Petitioner indicated at this time that he was not previously aware of this relationship. He subsequently stated, however, that he was satisifed with the representation of the attorney, Fred S. Hunt, III. Five days later, on July 14, 1981, at the outset of the trial, petitioner stated that he was still satisfied with his attorneys' services. He further indicated that he was satisfed that everything that should have been done had in fact been done in preparation for his trial. (App. 101.) Finally, he answered "no" when asked if there was anything he wished to ask the trial judge regarding these

procedures or his rights. (App. 102.) At a post-trial hearing on December 8, 1981, petitioner requested new counsel on the ground that no one had "told me from the start that Mr. Hunt's wife works for the Commonwealth's attorney. Therefore, I do not believe he is a partial [sic] lawyer." (App. 547-C.) Pursuant to this request, new counsel were appointed for petitioner on appeal to the Supreme Court of Virginia.

Respondent submits that as a matter of law this record reflects no conflict of interest. Certainly, it was not in Hunt's personal interest to lose this case. As a private attorney seeking new business, he derived no pecuniary or other benefit from Fitzgerald being convicted in this well publicized case. In effect, petitioner is arguing that Hunt could not properly serve as a defense attorney in any criminal case in Chesterfield County. Respondent is aware of no case law supporting such an untenable argument. Further, as the State Supreme Court noted on appeal, rather than Hunt's marriage harming Fitzgerald, it would be "more logical to believe that Hunt might obtain from his wife information that would be of assistance to him in defending Fitzgerald." 223 Va. at 638.

This Court stated in Cuyler v. Sullivan, 446 U.S. 335 (1980), that normally a trial judge "may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk or conflict

as may exist....Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." 446 U.S. at 347. The Court also held that a defendant who made no objection at trial "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Id. at 348. He could not simply point to the mere possibility of a conflict.

In the instant case, Fitzgerald raised no objection until months after his trial. Likewise, his lawyer, who is not alleged to have acted in bad faith, raised no question. Under these circumstances, the trial judge did something that was not mandatory under Cuyler -- on his own initiative he broached the matter of the marital relationship. Petitioner has pointed to nothing in the record that would show Hunt in any way "actively represented conflicting interests...." 446 U.S. at 350. The mere allegation that potential conflict of interests existed is inadequate to establish such a conflict.

Respondent further submits that Wood v. Georgia, 450 U.S. 261 (1980), which is relied upon by petitioner, is readily distinguishable from this case. In Wood v. Georgia, throughout the criminal proceedings the three defendants were represented by one attorney, who at all times was paid by their employer. Emphasizing the particular facts of the case, the Supreme Court held that a conflict of interests was strongly suggest[ed]" by the record. 450 U.S. at 273. In this factual context, where so many of the actions of the

attorney appeared to be intended more for the benefit of the employer rather than his clients, the trial court had an obligation to make a further inquiry. Id. at 272.

In contrast, the record in the present case reveals no such strong possibility of a conflict of interests. On the contrary, the record establishes, and petitioner does not assert to the contrary, that Hunt at all times vigorously sought to defend him. Respondent would further point out that at all stages of the trial petitioner was represented by a second attorney, Harold W. Burgess, Jr. The record demonstrates that he was actively involved in the defense of Fitzgerald. For example, he cross-examined the medical examiner and an expert witness for the prosecution and conducted the direct examination of a psychiatrist testifying on behalf of petitioner. He was also active in the preparation of the jury instructions and made several motions. (App. 504-C through 504-D, 507-10.) Cf. Durham v. Blankenship, 461 F.Supp. 492 (W.D. Va. 1978), dismissed without opinion, 609 F.2nd 506 (4th Cir. 1979) (no conflict of interest where co-counsel had undertaken "active and substantial role" in defense).

Finally, respondent states that the present claim has been waived by petitioner. Five days after being informed by the trial judge as to Hunt's marital status, he answered affirmatively when asked if he was still satisifed with his representation. He further stated that he had no questions

regarding any of his rights. A defendant must show "'that he did not knowingly and voluntarily waive his right to conflict-free representation.'" O'Kelley v. State of North Carolina, 606 F.2d 56, 57 (4th Cir. 1979). Here, petitioner was advised sufficiently prior to trial of his attorney's marital status. His later statement at trial that he was satisifed with Hunt's services should be regarded as a waiver of the present contention.

CONCLUSION

For the reasons presented, the respondent respectfully contends that the issues raised in this case are neither important nor substantial and ask this Court to deny the petitioner for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Robert H. Anderson, III, Assistant Attorney General of Virginia, am a member of the Bar of the Supreme Court of the United States, and on the 7th day of January, 1983, I mailed, with first class postage prepaid, a copy of the Respondent's Brief in Opposition to Granting of Writ of Certiorari to Bradley S. Stetler, Esquire, 419 Seventh Street, N.W., Suite 202, Washington, D.C., 20004, counsel for petitioner.

Robert H. Anderson, III
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